No. 01-9094-CFH Title: Abu-Ali Abdur'Rahman, Petitioner
v.
CAPITAL CASE Ricky Bell, Warden

Docketed: March 19, 2002 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Mar 19 2002	Application (01A702) for a stay of execution pending the disposition of a petition for a writ of certiorari, submitted to Justice Stevens.
	Mar 19 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 18, 2002)
	Mar 28 2002	Brief of respondent in opposition filed.
	Mar 28 2002	Response to application (01A702) filed by Ricky Bell, Warden.
	Apr 1 2002	Reply brief of petitioner filed.
	Apr 1 2002	Supplemental brief of petitioner filed.
	Apr 8 2002	Application (01A702) referred to the Court by Justice Stevens.
	Apr 8 2002	Application (01A702) granted by the Court.
	Apr 8 2002	REDISTRIBUTED for Conference of April 12, 2002
	Apr 15 2002	REDISTRIBUTED for Conference of April 19, 2002
	Apr 22 2002	Petition GRANTED. limited to Questions 1 and 2 presented by the petition. SET FOR ARGUMENT November 6, 2002. **********
	May 16 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including June 27, 2002.
	May 31 2002	Order further extending time to file the joint appendix and petitioner's brief on the merits to and including July 10, 2002.
	Jul 8 2002	Consent to the filing of all amicus briefs in support of either party received from counsel for the petitioner.
	Jul 10 2002	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jul 10 2002	Brief amici curiae of Former Prosecutors James F. Neal, et al. filed.
	Jul 10 2002	Joint appendix filed.
	Jul 10 2002	Brief of petitioner Abu-Ali Abdur'Rahman filed.
	Jul 10 2002	Motion of petitioner for appointment of counsel filed.
	Jul 29 2002	Order extending time to file respondent's brief on the merits to and including September 12, 2002.
	Aug 31 2002	CIRCULATED.
	Sep 11 2002	Motion DISTRIBUTED. September 30, 2002 (Page 162)
	Sep 12 2002	Brief amici curiae of Alabama, et al. filed.
	Sep 12 2002	Brief of respondent Ricky Bell, Warden filed.
	Sep 12 2002	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Sep 20 2002	Record filed.
	Sep 30 2002	Record filed.
	Oct 1 2002	Motion of respondent and Alabama, as amicus curiae, for

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Entry	Date	Proceedings and Orders
		divided argument and for leave to participate in oral argument as amicus curiae filed.
	Oct 7 2002	Motion for appointment of counsel GRANTED and it is ordered that Thomas C. Goldstein, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
	Oct 8 2002	Reply brief of petitioner Abu-Ali Abdur'Rahman filed.
	Oct 21 2002	Motion of respondent and Alabama, as amicus curiae, for divided argument and for leave to participate in oral argument as amicus curiae GRANTED.
	Oct 24 2002	The parties are directed to file supplemental briefs addressing the following question: "Did the Sixth Circuit have jurisdiction to review the district court's order, dated November 27, 2001, transferring Petitioner's Rule 60(b) Motion to the Sixth Circuit pursuant to 28 U.S.C. Section 1631? Does this Court have jurisdiction to review the Sixth Circuit's order, dated February 11, 2002, denying leave to file a second habeas corpus petition?" Briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, October 31, 2002. Twenty copies of the briefs prepared under Rule 33.2 may be filed initially in order to meet the October 31 filing date. Rule 29.2 does not apply. Forty copies of the briefs prepared under Rule 33.1 are to be filed as soon as possible thereafter.
	Oct 31 2002	Supplemental brief of respondent filed.
	Oct 31 2002	Supplemental brief of petitioner Abu-Ali Abdur'Rahman filed.
	Nov 6 2002	ARGUED.

(2)

FILED
MAR 19 20
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CAPITAL CASE – EXECUTION DATE: 4/10/02 1:00 a.m.

No. 01-9094

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 18, 2002

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QUESTIONS PRESENTED

The district court in this case held that it was powerless to consider many of Petitioner's federal habeas claims because they had not been sufficiently presented in a petition for discretionary review to the Tennessee Supreme Court. The district court granted Petitioner relief as to other claims in a ruling that was later reversed on appeal. While the appeal was pending, however, the Tennessee Supreme Court issued Rule 39 ("TN Rule 39"), which on its face applies to Petitioner's case, and which expressly "clarif[ies]" that such a discretionary application is *not* required for "exhaustion of state remedies for federal habeas corpus purposes." Petitioner's claims thus had properly been exhausted. See *Randolph* v. *Kemna*, 276 F.3d 401 (CA8 2002) (applying similar Missouri rule); *Swoopes* v. *Sublett*, 196 F.3d 1008 (CA9 1999) (Arizona), *cert. denied*, 529 U.S. 1124 (2000).

The Sixth Circuit nonetheless categorically refused to permit the district court to consider TN Rule 39 and thus to consider the merits of the claims the district court had erroneously held to be defaulted. Petitioner moved in the district court for relief from judgment pursuant to Fed. R. Civ. P. 60(b), but the court of appeals held that every such motion is prohibited as a matter of law as a "second or successive" habeas application. In addition, before the mandate issued in the prior appeal, Petitioner separately moved in the court of appeals for a remand so the district court could apply TN Rule 39. But the court of appeals refused, notwithstanding that Petitioner would otherwise be prohibited from receiving any adjudication of his constitutional claims on the merits and would be executed as a result.

The Questions Presented are:

1. Whether the Sixth Circuit erred in holding, in square conflict with decisions of this Court and of other circuits, that every Rule 60(b) Motion constitutes a prohibited "second or successive" habeas petition as a matter of law.

2. Whether a court of appeals abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a habeas petitioner from ever receiving any adjudication of his claims on the merits.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Abu-Ali Abdur'Rahman (hereinafter, "Petitioner") respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

This Petition seeks review of two judgments of the Sixth Circuit. See S. Ct. R. 12.3. The judgments are embodied in a single unpublished Order (Pet. App. B1-B2) incorporating a prior unpublished Order (*id.* A1-A3). The district court's orders (Pet. App. C1-C3, D1-D2) are unpublished. The district court's prior opinion granting Petitioner a writ of habeas corpus and vacating his death sentence (Pet. App. E1-E59) is published at 999 F. Supp. 1073. The Sixth Circuit's divided opinion reversing (*id.* F1-F47) is published at 226 F.3d 696.

JURISDICTION

Petitioner filed a motion for relief from judgment in the district court pursuant to Fed. R. Civ. P. 60(b) (the "Rule 60(b) Motion"). The district court transferred the case to the Sixth Circuit pursuant to 28 U.S.C. 1631. The court of appeals then denied Petitioner relief on February 11, 2002.[1]

Petitioner furthermore seeks review of the Sixth Circuit's denial of rehearing and rehearing *en banc*, embodied in the same February 11 Order, to remand Petitioner's prior appeal. See Pet. App. B2. Cf. *Calderon* v. *Thompson*, 523 U.S. 538 (1998) (reviewing court of appeals' decision to grant such relief).

This Court has jurisdiction over the Sixth Circuit's judgments and orders pursuant to 28 U.S.C. 1254(1). See generally *Hohn* v. *United States*, 524 U.S. 236 (1998) (describing the broad categories of cases reviewable in this Court).

STATUTE AND RULE INVOLVED

28 U.S.C. 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) The applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application satisfies the requirements of this subsection.

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[1] Petitioner specifically seeks review of the Sixth Circuit's *predicate* determination, embodied in a final order in this case as set forth in the February 11, 2002 Order, that Petitioner's Rule 60(b) Motion is a "second or successive" habeas application. Petitioner does not seek review of the Sixth Circuit's gatekeeping ruling denying him "authorization" to file a "second or successive" application on the ground that he had failed to satisfy the criteria of 28 U.S.C. 2244(b)(1) & (2). See 28 U.S.C. 2244(b)(3)(E). If this Court determines it lacks jurisdiction to grant this Petition, it should grant his parallel Petition for an original writ of habeas corpus pursuant to *Felker* v. *Turpin*, 518 U.S. 651 (1996). See No. 01-___, *In re Abdur'Rahman*.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Fed. R. Civ. P. 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The district court in this case refused to consider many of Petitioner's federal constitutional claims (including serious claims of prosecutorial misconduct) on the merits because they were not presented in a petition for discretionary review to the Tennessee Supreme Court. The district court thus applied a presumption that, because the Tennessee Supreme Court had not stated to the contrary, such an application was both an available form of relief for a state prisoner such as Petitioner and necessary to exhaust state remedies. Pet. App. E15-E16. Accord *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999). Before the judgment on Petitioner's habeas petition became final, however, the Tennessee Supreme Court issued its Rule 39 ("TN Rule 39"), which provides that such a discretionary application is *not* required for "exhaustion of state remedies for federal habeas corpus purposes." TN Rule 39 furthermore applies to Petitioner's case, as it explicitly "clarif[ies]" existing law and expressly applies "[i]n *all appeals from criminal convictions or post-conviction matters from and after July 1, 1967*" (emphasis added). The Sixth

Circuit, however, refused to permit the district court to apply TN Rule 39 either (a) pursuant to a motion for relief from judgment under Fed. R. Civ. P. 60(b), or (b) by remanding the case (which had not yet become final) to the district court for application of TN Rule 39. See Pet. App. A1-A3, B1-B2.

I. State Court Proceedings

In July 1987, Petitioner was convicted in Tennessee of first-degree murder and sentenced to death. His conviction and death sentence were affirmed on direct appeal to the Tennessee Supreme Court. *State* v. *Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990).

Petitioner pursued state post-conviction relief, in which he asserted a number of claims, including claims of ineffective assistance of counsel and prosecutorial misconduct at both the guilt and sentencing stages of the case. In August 1993, the trial judge issued a decision denying Petitioner's claims for post-conviction relief. Petitioner filed an appeal as of right from the trial court's decision to the Tennessee Court of Criminal Appeals. In his appeal as of right, Petitioner presented his ineffective assistance of counsel claims and his prosecutorial misconduct claims, as well as other claims. The Tennessee Court of Criminal Appeals affirmed the trial court's denial of Petitioner's petition for post-conviction relief. *Jones* v. *State*, No. 01C01-9402-CR-00079, 1995 Tenn. Crim. App. LEXIS 140 (Tenn. Crim. App. Feb. 23, 1995).

Petitioner filed an Application for Permission to Appeal to the Tennessee Supreme Court. Although this Application presented Petitioner's ineffective assistance of counsel claims and certain other claims, this Application did not set forth the bulk of Petitioner's prosecutorial misconduct claims. The Tennessee Supreme Court denied this Application without discussion. *Jones* v. *State*, No. 01C01-9402-CR-00079 (Tenn., filed Aug. 28, 1995). This Court denied certiorari. 516 U.S. 1122 (1996).

II. Petitioner's Application For A Writ Of Habeas Corpus

On February 23, 1996, Petitioner filed a petition in federal district court for a writ of habeas corpus pursuant to 28 U.S.C. 2254.[2] As a threshold matter, however, the district court accepted Respondent's argument "that the [c]ourt should not reach the merits" of many of Petitioner's claims because, although Petitioner had presented those claims to the Tennessee Court of Criminal Appeals, he had failed to present them sufficiently in his application for discretionary review to the Tennessee Supreme Court. Pet. App. E6. The district court specifically acknowledged the "split of authority" in the circuits that then existed over whether a claim must be presented to a state's highest court in order to be deemed properly exhausted, but the court nonetheless considered itself bound by the Sixth Circuit's prior holding "that a petitioner must seek discretionary review." *Id.* E9-E10. The Sixth Circuit's rule thus created, and the district court applied in this case, a default presumption that (absent a contrary statement by the state supreme court) a petition for discretionary review is an available and necessary means of exhausting state remedies. *Id.* E15-E16. The district court accordingly concluded that Petitioner had "failed to exhaust" most of his claims and that, "because Petitioner has no remedy currently available in state court, these claims are procedurally defaulted." *Id.* E16. In particular, the district court held that the great majority of Petitioner's prosecutorial misconduct claims were defaulted on this basis. *Id.* E12-E16. See also *infra* at 28 (detailing why Petitioner's claims raise grave doubts about his sentence, including misconduct claims involving the prosecutor in this case, who has been *repeatedly* sanctioned for gravely unethical misconduct in other matters).

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[2] The trial court proceedings in this case are accordingly not governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See *Lindh* v. *Murphy*, 521 U.S. 320 (1997).

The district court held that Petitioner's claim of ineffective assistance by his state trial counsel, by contrast, had been fully presented to the Tennessee Supreme Court and thus could be considered on its merits. The district court conducted an extensive evidentiary hearing and found an egregious constitutional violation at sentencing because Petitioner's counsel had failed to introduce *any* of the "abundan[t]" available mitigation evidence. Pet. App. E3. The court found it inescapable that petitioner's counsel "utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death. This is not a case of harmless error." *Id.* E57.

On Respondent's appeal, a divided panel of the Sixth Circuit reversed. Although the court of appeals rejected Respondent's only argument on appeal – that the district court lacked authority to create an evidentiary record – two members of the court *sua sponte* overturned the district court's factual finding of prejudice with only two sentences of explanation. See Pet. App. F21 The Sixth Circuit denied rehearing and rehearing *en banc* (*id.* G1) by divided votes, but granted a stay of its mandate pending the disposition of Petitioner's petition for a writ of certiorari (hereinafter, "the 2001 Cert. Petition"). Respondent opposed review in this Court principally on the ground that the questions presented by the 2001 Cert. Petition were fact-bound, and this Court subsequently denied certiorari. No. 00-1742, 122 S. Ct. 368 (2001).

III. Proceedings Relating To Tennessee Supreme Court Rule 39

1. While the district court's decision granting Petitioner a writ of habeas corpus was pending on appeal, the Tennessee Supreme Court promulgated that Court's Rule 39 (hereinafter, "TN Rule 39"). The Rule establishes beyond peradventure that the default presumption, applied by the district court in this case, that a petition for discretionary review is an available and necessary means of exhausting all state remedies in Tennessee is *not correct*. The express

purpose of Rule 39 is thus "to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes." The Rule provides:

> [A] litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all state remedies available for that claim.

Particularly vital for the purposes of this case, TN Rule 39 on its face encompasses Petitioner's case – it avowedly seeks to "clarify" existing law, and expressly applies "[i]n *all appeals* from criminal convictions or post-conviction matters *from and after July 1, 1967*" (emphasis added).[3]

2. Petitioner moved in the district court for relief from judgment under Fed. R. Civ. P. 60(b) to have the claims previously held defaulted, including particularly the prosecutorial misconduct claims (hereinafter, "the TN Rule 39 Claims"), decided on the merits. Petitioner asserted that, under TN Rule 39, he had exhausted his claims. As other circuits have concluded with respect to similar statutes, such a state rule satisfies the exhaustion requirement. See *Randolph* v. *Kemna*, 276 F.3d 401 (CA8 2002) (so holding in case applying parallel Missouri Supreme Court Rule to holding of *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999), that, unless state law is to the contrary, exhaustion requires that claims be presented in petition to state supreme court for discretionary review); *Swoopes* v. *Sublett*, 196 F.3d 1008 (CA9 1999) (same with respect to exhaustion in Arizona, on remand for reconsideration in light of *O'Sullivan*), *cert. denied*, 529 U.S. 1124 (2000).

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[3] Respondent nonetheless argued in the district court that TN Rule 39 only applies to state court appeals completed after the Rule's effective date. That state-law question is presently pending before the Sixth Circuit in another case, No. 00-6575, *Adams* v. *Holland*. Because this Petition argues only that the district court was not barred from considering Petitioner's Rule 60(b) Motion – and thus was not barred from considering the effect of TN Rule 39 – no question of state law is a predicate to deciding the question presented.

Petitioner specifically explained that his Rule 60(b) Motion did not constitute a "second or successive" habeas corpus petition, particularly because he was not raising any new claims, facts, or evidence and because the district court had not previously decided the TN Rule 39 Claims "on the merits." As Respondent later candidly admitted in the Sixth Circuit: "Appellant has *not* presented any new 'claim' for habeas corpus relief." Response To, *Inter Alia*, "Appeal From Denial Of Motion For Relief From Judgment Under Fed. R. Civ. P. 60(b)" 6 (Dec. 19, 2001) (emphasis added). In support, Petitioner invoked the Second Circuit's square holding in *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001), that, as a matter of law, a Rule 60(b) Motion is *not* a "second or successive" petition.

In his response to the Rule 60(b) Motion, Respondent did not address whether Petitioner was entitled to relief on the TN Rule 39 Claims. Rather, Respondent principally argued that the Rule 60(b) Motion was an improper "second or successive" habeas petition. Respondent acknowledged the Second Circuit's square holding in *Rodriguez* but maintained that *Rodriguez* was irrelevant because the Sixth Circuit had explicitly adopted a contrary rule, "agree[ing] with those Circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition.'" Resp. D. Ct. Br. 3 (quoting *McQueen* v. *Scroggy*, 99 F.3d 1302, 1335 (1996)).[4]

The district court agreed with Respondent that it was powerless to consider Petitioner's Rule 60(b) Motion, and therefore was powerless to consider the TN Rule 39 claims on the merits. At the outset, the court *acknowledged* that Petitioner would be entitled to relief in the Second Circuit because, "[i]n *Rodriguez*, the Second Circuit held 'a Motion under Rule 60(b) to

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[4] As this Petition explains *infra* at 14-18, in reality, other circuits manifestly *do not* agree that a Rule 60(b) motion is, in this context, a "second or successive" habeas application.

vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).'" Pet. App. C2-C3 (quoting 252 F.3d at 198). But the court deemed itself bound to follow the Sixth Circuit's contrary rule that "the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition." *Id.* (citing *McQueen*, *supra*).

3. Under Sixth Circuit precedent, when a district court is presented with a "second or successive" habeas application, it must transfer the case to the Sixth Circuit pursuant to 28 U.S.C. 1631 for that court to apply the gatekeeping criteria of 28 U.S.C. 2244(b)(1) & (2). See *In re Sims*, 111 F.3d 45 (1997). The district court in this case applied that rule and entered a transfer order. Pet. App. C3. Petitioner filed a notice of appeal and furthermore sought a Certificate of Appealability from the court of appeals, contesting the district court's determination that Petitioner's Rule 60(b) Motion is, in fact, a "second or successive" habeas application. Respondent, by contrast, argued that the transfer order was not appealable. The Sixth Circuit entered two orders.

First, on January 18, 2002, the court of appeals entered an Order providing that "the application for a certificate of appealability is denied." Pet. App. A3. The Sixth Circuit held that "*[t]he district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas corpus petition, see McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996)*, so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gate[keeping] criteria of 28 U.S.C. § 2244(b)." *Id.* A2 (emphasis added).

As both Petitioner and Respondent have agreed throughout these proceedings, the gatekeeping criteria cannot provide Petitioner with any relief because his Rule 60(b) Motion raises only the claims in his initial petition. If it is a "second or successive" application, it must

therefore be dismissed as a matter of law under Section 2244(b)(1), which provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."

Without explanation, the Sixth Circuit nonetheless found "it * * * necessary to determine whether the petition meets the criteria of 28 U.S.C. § 2244(b)*(2)*" (Pet. App. A2 (emphasis added)), which governs "[a] claim * * * that was *not* presented in a prior application." Reciting the statutory language, the court held that Petitioner "has not been able to meet these criteria." *Id.* Petitioner did not satisfy Section 2244(b)(2)(A), regarding intervening legal developments, because "he does not rely upon a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." *Id.* Petitioner also did not satisfy Section 2244(b)(2)(B), regarding intervening factual developments, because "there is no factual predicate for the claim which could not have been discovered previously through the exercise of due diligence" and "he does not show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense charged." *Id.* This was true, the Sixth Circuit explained, because the grounds raised by Petitioner's Rule 60(b) motion are purely *legal*, not factual: Petitioner relies on a new "state procedural rule"; the district court's original decision finding the TN Rule 39 Claims procedurally defaulted "properly found that the claims were then unexhausted for failure to present them before the Tennessee Supreme Court"; and "the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." *Id.* A2-A3.

Second, on February 11, 2002, the court of appeals entered a further Order concluding that (despite its January 18 Order), it could not consider Petitioner's appeal and his request for a

COA. Rather, adopting Respondent's argument, the Sixth Circuit held that the transfer pursuant to 28 U.S.C. 1631 required it to decide the issue as an original, not appellate, matter. The court of appeals therefore provided: "The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in No. 01-6504 [the docket number of petitioner's appeal and request for a COA], which is therefore DISMISSED for lack of jurisdiction." Pet. App. B2.[5]

The Sixth Circuit then turned to (what it characterized as) Petitioner's "application for leave to file a second habeas corpus petition, as transferred to this court by the district court in No. 01-6487." Pet. App. B2. The court of appeals held that the application was "DENIED," based on the reasoning of its "opinion filed * * * on January 18, 2002" – *viz.*, that Petitioner could not satisfy the gatekeeping criteria of 28 U.S.C. 2244(b)(2) for intervening factual developments because his claims are purely legal: "'...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default.'" *Id.* (alteration in original). *Id.*

In the same February 11 Order, the Sixth Circuit denied Petitioner's motion for rehearing from the prior appeal, again by a divided vote. Petitioner had filed that motion after this Court denied the 2001 Cert. Petition but before the court of appeals issued its mandate. The motion sought to have the case remanded for further consideration of TN Rule 39. See *infra* at 29-32 (detailing cases holding that courts of appeal may grant such relief). The Sixth Circuit continued

[5] The appealability of the district court's transfer order is irrelevant to this Court's jurisdiction. Once the Sixth Circuit itself decided the transferred case, its ruling was plainly reviewable in this Court.

the stay of its mandate while Petitioner's rehearing request was pending. When the court of appeals denied the rehearing request on February 11, it issued its mandate. See Pet. App. B2.[6]

4. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari should be granted for three reasons. *First*, the Sixth Circuit's holding that Petitioner's Rule 60(b) Motion is a prohibited "second or successive" habeas application conflicts with decisions of other circuits on an issue that has the potential to arise in essentially any habeas case. *Second*, the Sixth Circuit's decision conflicts with this Court's precedents, which hold that a petition is "successive" only if it seeks to raise new claims or seeks an adjudication of claims that have already been decided "on the merits." *Third*, the second question presented by this Petition – addressing whether this case should have been remanded for application of TN Rule 39 before the judgment against Petitioner became final – presents an important and recurring question of federal procedure: how the courts of appeals should apply critical intervening developments in state law.

I. The Circuits Are Irreconcilably Divided Over Whether And When A Rule 60(b) Motion Constitutes A "Second Or Successive" Habeas Application.

The Sixth Circuit applied a categorical rule that every Rule 60(b) Motion filed by a habeas petitioner constitutes a "second or successive" habeas application and therefore is subject to the extreme strictures of 28 U.S.C. 2244(b), which interposes the court of appeals as a gatekeeper and permits such applications to be filed only in exceedingly narrow circumstances. See 28 U.S.C. 2244(b)(1) ("A claim presented in a second or successive habeas corpus

[6] When the Sixth Circuit issued its mandate on the prior appeal on February 28, 2002, it for the first time entered a judgment against Petitioner. The court's contemporaneous ruling on the transferred motion (see *supra*) denied Petitioner relief from that judgment under Rule 60(b).

application under section 2254 that was presented in a prior application shall be dismissed."), 2244(b)(2) ("[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless" certain very narrow exceptions are satisfied). The Sixth Circuit held that this case did not satisfy the gatekeeping criteria and therefore refused to permit the district court to consider Petitioner's Rule 60(b) Motion. Pet. App. A2, B2.

The Sixth Circuit's holding is the subject of an outcome-determinative, three-way circuit conflict. The Sixth Circuit is the *only* court to deem a Rule 60(b) motion a "second or successive" habeas petition in all circumstances, including those of this case. As this Petition explains *infra*, other circuits apply either of two approaches:

- The Second Circuit has adopted the *opposite* categorical rule, holding that a Rule 60(b) motion is *never* a "second or successive" application.

- Numerous other circuits hold that a Rule 60(b) motion "may" be deemed a "second or successive" application *if* it is the "functional equivalent" of a successive application because it presents new claims or seeks to relitigate claims that the district court has already decided on the merits, *neither* of which is true in this case.

Other circuits thus recognize that it would be completely absurd to hold that every Rule 60(b) motion is a "second or successive" application. Imagine a circumstance in which a district court is misled by the state into entering a judgment against a habeas petitioner, whether through outright "fraud" or more generally through "misconduct," both of which are expressly recognized as grounds for relief from judgment under Rule 60(b)(3). On the Sixth Circuit's view, if the petitioner discovers the fraud and files a Rule 60(b) motion, that motion is a "second or successive" application as a matter of law and, because it raises the same claims as the initial application, it categorically "shall be dismissed" under 28 U.S.C. § 2244(b)(1). That cannot conceivably be correct. Cf. *United States* v. *MacDonald*, No. 97-7297, 1998 U.S. App. LEXIS

22073 (CA4 Sept. 8, 1998) (holding that Rule 60(b) motion is not "second or successive" application when motion alleges that "prior petition had been denied based on fraud"); see also *infra* at 15-16, 18, 19 (citing numerous cases in which courts have found Rule 60(b) relief appropriate in habeas cases). The Sixth Circuit's holding also logically deems every motion under Rule 59(e) (governing any attempt "to alter or amend [a] judgment") to be a "second or successive" application, notwithstanding that district courts regularly invoke Rule 59(e) to correct their own errors. Nothing in the text of the AEDPA, its legislative history, or the policies it embodies suggests that Congress would intend such an unheard-of result. And for the reasons discussed *infra*, decisions of every other circuit and this Court flatly reject such a suggestion.[7]

1. The decision below squarely conflicts with the Second Circuit's decision in *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001). *Rodriguez* holds as a matter of law that "a motion under Rule 60(b) to vacate a judgment denying habeas is not the equivalent of a second or successive habeas petition subject to the standards of § 2244(b)." 252 F.3d at 194. See also *id.* at 198 ("We now rule that a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).").

The Second Circuit rested its categorical rule on two grounds. *First*, "[a] motion under Rule 60(b) and a petition for habeas have different objectives": "The habeas motion under 28

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[7] The Sixth Circuit's rule also makes no sense because it grants more favorable treatment to *new* claims – *i.e.*, claims raised for the first time in a "second or successive" application – than to claims that were raised in an initial application *but were never considered "on the merits"* for procedural reasons. Under long-standing habeas law, the former are seriously disfavored under the "abuse of the writ" doctrine while the latter are *permitted*. See *infra* at 24 (quoting Rule 9(b) of the former 28 U.S.C. 2254). The Sixth Circuit's rule, by contrast, provides that *new* claims may be considered through a Rule 60(b) Motion – because they may meet the gatekeeping criteria of Section 2244(b)(2) – while claims that the district court previously did not address on the merits are categorically forbidden by Section 2244(b)(1). Again, Congress cannot have intended that result.

U.S.C. § 2254 seeks to invalidate the state court's judgment of conviction," in contrast to a Rule 60(b) motion, which (although "a step on the road to the ultimate objective of invalidating the judgment of conviction") "seeks only to vacate the federal court judgment dismissing the habeas petition." 252 F.3d at 198. A successful Rule 60(b) motion would not "invalidat[e] the state conviction," but instead "would merely reinstate the previously dismissed petition for habeas, opening the way for further proceedings seeking ultimately to vacate the conviction." *Id.* *Second*, "the grounds asserted in support of the motion under Rule 60(b) may well have nothing to do with the alleged violations of federal rights during the state criminal trial that are asserted as a basis for the habeas." *Id.* at 199.

Of particular note, the Second Circuit specifically *acknowledged* that it was expanding a split in the circuits. "We are aware that the majority of circuit courts that have considered this issue have held that a Rule 60(b) motion to vacate a judgment denying habeas either *must* or *may* be treated as a second or successive habeas petition." 252 F.3d at 199-200 (emphasis added) (collecting cases). The Second Circuit explicitly rejected those decisions: "These courts, however, have offered little explanation in support of their reasoning. Their opinions depend largely on conclusory statements and citations to one another. In our view, better reasons support the conclusion that a Rule 60(b) motion to vacate a judgment denying habeas is not a second petition under § 2244(b)." *Id.* at 200.

The Second Circuit specifically rejected the view of other circuits that a Rule 60(b) motion "may" or "must" be deemed a second or successive petition because such a motion "contemplates ultimately the vacating of the conviction." 252 F.3d at 198. That objective, the court explained, "is shared with every motion the petitioner might make in the course of pursuing his habeas": "All such motions, like the motion under Rule 60(b), seek to advance the ultimate

objective of vacating the criminal conviction. But each seeks relief that is merely a step along the way." *Id.* at 198-99.

Of note, *even before Rodriguez*, district courts in the Second Circuit regularly granted Rule 60(b) motions to reopen habeas proceedings, rejecting the argument that such motions are successive applications.[8] Particularly noteworthy is a series of district court cases granting Rule 60(b) relief to individuals whose habeas petitions had been dismissed as untimely prior to the Second Circuit's adoption of a rule granting inmates whose convictions became final prior to AEDPA a one-year grace period following AEDPA's effective date to file petitions.[9]

Plainly, Petitioner would prevail in the Second Circuit as a matter of law. Under the square holding of *Rodriguez*, Petitioner's Rule 60(b) Motion is not a second or successive habeas application and the district court would be obligated to consider the Motion. Indeed, both Respondent and the district court candidly admitted as much, but Respondent persuaded the district court, and then the Sixth Circuit, that they were bound by Sixth Circuit precedent to reach a contrary result. See *supra* at 8-9.

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[8] *E.g.*, *Montalvo* v. *Portuondo*, No. 97 Civ. 3336 (RWS), 2001 U.S. Dist. LEXIS 10686, at *2 (S.D.N.Y. July 30, 2001) (petition reinstated following grant of habeas relief to petitioner's co-defendant when "the vast majority of the evidence relevant to [co-defendant's] habeas petition applies to [petitioner]"); *Diaz* v. *Garvin*, No. 92 Civ. 4778 (MBM), 1995 U.S. Dist. LEXIS 10777 (S.D.N.Y. Aug. 3, 1995) (noting that court had previously granted Rule 60(b) motion to vacate judgment denying habeas (because of failure to object to magistrate judge's recommendation) when delay in prison mail delivery prevented petitioner from objecting); *Rivera* v. *Leonardo*, No. 92 Civ. 1506 (PNL), 1993 U.S. Dist. LEXIS 10328, at *1 (S.D.N.Y. July 28, 1993) (court, which had previously dismissed habeas petition "without reaching the merits" because it "concluded that [petitioner] had not exhausted his state remedies," agrees with petitioner's argument in Rule 60(b) motion that avenue suggested to exhaust was inappropriate); *Elmore* v. *Henderson*, No. 85 Civ. 0579, 1989 U.S. Dist. LEXIS 8742 (S.D.N.Y. July 28, 1989) (grants Rule 60(b) motion requesting that district court vacate opinion denying habeas relief and re-enter judgment so that petitioner can file timely appeal when petitioner not notified of court's decision denying petition).

[9] See *Matos* v. *Portuondo*, 33 F. Supp. 2d 317 (S.D.N.Y. 1999); *Tal* v. *Miller*, No. 97 Civ. 2275 (JGK), 1999 U.S. Dist. LEXIS 652 (S.D.N.Y. Jan. 27, 1999); *Robles* v. *Senkowski*, No. 97 Civ. 2798 (MGC), 1999 U.S. Dist. LEXIS 11565 (S.D.N.Y. July 30, 1999); *Reinoso* v. *Artuz*, No. 97 Civ. 3174 (MGC), 1999 U.S. Dist. LEXIS 7768 (S.D.N.Y. May 25, 1999); *Liberatore* v. *McGuiness*, No. 96 Civ. 6943

2. Petitioner also would prevail in the many circuits that reject the Sixth Circuit's categorical rule that every Rule 60(b) motion is a "second or successive" habeas petition and instead hold that a district court "may" deem a Rule 60(b) motion a "second or successive" application in appropriate circumstances. As explained by the *en banc* Ninth Circuit, "[i]t suffices to say that a bright line rule equating all Rule 60(b) motions with successive habeas petitions would be improper." *Thompson* v. *Calderon*, 151 F.3d 918, 921 n.3 (1998).[10]

The rule in the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits is thus that a Rule 60(b) motion "*may*," in certain specific circumstances, be deemed a "second or successive" application. Those courts focus on whether the Rule 60(b) motion seeks to evade the bar to successive applications by (i) raising new claims or evidence, or (ii) relitigating claims that have already been decided on the merits. See *Thompson* v. *Calderon*, *supra*, 151 F.3d at 921 (when petitioner relies on newly discovered evidence regarding already-decided claim, "the factual predicate for a Rule 60(b) motion also states a claim for a successive petition" and should be treated as such); *United States* v. *Rich*, 141 F.3d 550, 553 (CA5 1998) (district court "may" deem Rule 60(b) motion successive petition if "the functional equivalent of a motion under § 2255"; in that case, petitioner sought reconsideration of claim previously decided on the merits); *Felker* v. *Turpin*, 101 F.3d 657, 660 (CA11 1996) (deeming Rule 60(b) motion to be a prohibited application because it would be "tantamount to a second or successive petition" and "Rule 60(b) cannot be used to circumvent restraints or successive petitions"); *Mathenia* v. *Delo*, 99 F.3d 1476 (CA8 1996), *cert. denied*, 521 U.S. 1123 (1997) (holding that claims in Rule 60(b) motion

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(CLB), 1998 U.S. Dist. LEXIS 22842 (S.D.N.Y. Oct. 7, 1998); *Rashid* v. *Kuhlman*, No. 97 Civ. 3037 (RCC) (HBP), 2000 U.S. Dist. LEXIS 18212 (S.D.N.Y. Dec. 19, 2000).

[10] The Ninth Circuit's ruling is particularly significant because it came on the heels of this Court's prior ruling in the same case that a "motion to recall the mandate" cannot be categorically deemed a successive petition. See *infra* at 19-20.

"were successive because they raised 'grounds identical to grounds heard and decided on the merits in [the petitioner's] previous petition'" (quoting *Sawyer* v. *Whitley*, 505 U.S. 333, 338 (1992)); *Hunt* v. *Nuth*, 57 F.3d 1327, 1339 (CA4 1995) (district court "may" treat 60(b) motion as successive and properly did so when motion sought consideration of claims "omitted" from original petition and thus "were equivalent to additional habeas claims").

This case-by-case approach is illustrated by decisions applying it to grant habeas relief to petitioners under Rule 60(b). See, *e.g.*, *United States* v. *Brown*, 179 F.R.D. 323 (D. Kan. 1998) (granting Rule 60(b) relief to re-enter judgment because petitioner did not receive notice until a year later and thus could not otherwise appeal); *Whitmore* v. *Avery*, 179 F.R.D. 252, 258-60 (D. Neb. 1998) (adopting magistrate's report and recommendation; distinguishing appellate precedent denying Rule 60(b) relief as "second or successive" as turning on facts in which "the petitioner sought by his motion to present claims which either had not been presented before in his earlier petition, or had been presented and decided on the merits"; granting Rule 60(b) relief because order dismissing prior application was "erroneous").

The district court plainly would have been permitted to consider Petitioner's Rule 60(b) Motion in the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. Petitioner does not seek to raise any claims not presented in his initial habeas petition, nor does he seek to relitigate any claim that had been decided on its merits. Rather, he seeks to re-open the district court's earlier judgment to receive an adjudication of the claims that the district court held it could not consider on the merits because (on the court's erroneous presumption regarding the need to seek discretionary review in the Tennessee Supreme Court) those claims had been procedurally defaulted.

3. This circuit conflict furthermore merits review in this Court because of its unquestionable importance. Although the significance of this particular case is heightened because Petitioner is subject to an imminent sentence of death, the proper treatment of Rule 60(b) motions by habeas petitioners can arise in *any* capital or non-capital proceeding under Section 2254 *or* Section 2255. The numerous cases cited in this Petition to illustrate the lower courts' treatment of Rule 60(b) motions demonstrate that the question presented recurs frequently. Indeed, given that both district courts and courts of appeals regularly rule on habeas petitioners' Rule 60(b) motions without considering the implication of the statutory provisions governing "second or successive" petitions, compare *Todd* v. *Stegall*, No. 98-72656, 2000 U.S. Dist. LEXIS 12997 (E.D. Mich. Aug. 1, 2000) (granting relief), and *Evans* v. *Fulcomer*, No. 89-4999, 1990 U.S. Dist. LEXIS 7160 (E.D. Pa. June 13, 1990) (same) with *Waye* v. *Townley*, 884 F.2d 762 (CA4 1989) (per curiam) (denying relief); *May* v. *Collins*, 961 F.2d 74 (CA5 1992) (per curiam) (same); *Wenger* v. *O'Brien*, No. 00-1103, 2000 U.S. App. LEXIS 15487 (CA7 June 28, 2000) (same), only a decision by this Court can bring needed uniformity to the law.

Because the district court would have considered Petitioner's Rule 60(b) Motion under either the categorical rule of the Second Circuit or the case-by-case approach of the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits, and because the question presented is important and recurs frequently, certiorari should be granted.

II. The Decision Below Conflicts With This Court's Precedents.

1. Certiorari also is warranted because the Sixth Circuit's determination that the Rule 60(b) Motion in this case constitutes a "second or successive" habeas application conflicts with this Court's precedents. *Calderon* v. *Thompson*, 523 U.S. 538 (1998), held that the Ninth Circuit abused its discretion in recalling its mandate on the facts of that case. Before reaching that

question, however, the Court first *rejected* the State's contention that the court of appeals had acted on the basis of a "second or successive" petition. This Court explained that a "motion to recall the mandate on the basis of the merits of the underlying decision *can* be regarded as a second or successive application for purposes of § 2244(b)," but made clear that the proper characterization of the motion "depend[s] on the underlying basis of the court's action." 523 U.S. at 553-54 (emphasis added). The Court announced the following standard: If "the court considers *new claims or evidence* presented in a successive application for habeas relief, it is proper to regard the court's action as based on that application." *Id.* at 554 (emphasis added). Because the court of appeals in *Calderon* "was specific in reciting that it acted on the exclusive basis of [the petitioner's] first federal habeas petition," and that recitation was accurate, this Court held that the Ninth Circuit's decision did not rest on a "second or successive" application. *Id.* Indeed, the Court's holding in that regard was unanimous. See *id.* at 566 (Souter, J., dissenting).

Just a few weeks later, *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), held (by a seven-to-two majority) that a motion to reopen claims that the district court had previously held to be unripe is *not* a "second or successive" application. The district court in that case initially granted the petitioner habeas corpus relief on one claim but dismissed another claim – that he was incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986) – as premature. The court of appeals reversed the grant of relief. Subsequently, the petitioner filed a motion in the district court "to reopen his *Ford* claim," which the district court deemed an impermissible "second or successive" petition.

This Court rejected the district court's conclusion. In particular, the Court rejected the State's arguments that a habeas petitioner "is entitled to only one merits judgment on his federal

habeas claim" and that, because the petitioner in that case had "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.'" 523 U.S. at 643 (quoting Pet'r Br. 12)). The State's error, the Court explained, was its failure to recognize that "the only claim on which respondent now seeks relief is the *Ford* claim that he presented to the District Court, along with a series of other claims, in [his previous application]":

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). *There was only one application for habeas relief*, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. *Respondent was entitled to an adjudication of all the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.*

Id. at 643-44 (emphasis added). The Court thus distinguished the case before it from "the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." *Id.* at 645 n.*.

The Court found particularly persuasive an analogy to the proper treatment of habeas applications that are dismissed for failure to exhaust state remedies, but are subsequently re-filed. In that circumstance, the subsequently filed petition is not "successive." 523 U.S. at 644. The Court concluded that a claim previously dismissed on procedural grounds "should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies." The *critical* factor for the Court was that "in both situations, the habeas petitioner *does not receive an adjudication of his claim*. To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons *would bar the prisoner from ever obtaining federal habeas review*." *Id.* at 645 (emphasis added).

This Court subsequently applied *Martinez-Villareal* to hold (by the same seven-to-two majority) in *Slack* v. *McDaniel*, 529 U.S. 473 (2000), that a re-filed petition for habeas corpus raising claims that were previously dismissed for failure to exhaust is not a "second or successive" habeas petition. "A habeas petition filed in the district court after an initial habeas petition was *unadjudicated on its merits* and dismissed for failure to exhaust state remedies is not a second or successive petition." 529 U.S. at 485-86 (emphasis added). Of note, even the two dissenters in *Slack* thought it "quite plausible" to read this Court's precedents not to deem a habeas petitioner's attempt to pursue the *same* claims that the district court previously refused to consider on the merits a "second or successive petition" because such a step "is just a renewal of the first petition." *Id.* at 491. The dissenters believed it impermissible, however, to permit the petitioner to proceed on claims that were not raised in his initial application. *Id.*

2. The Sixth Circuit's holding that Petitioner's Rule 60(b) Motion was a prohibited "second or successive" application is totally irreconcilable with this Court's decisions in *Calderon* v. *Thompson*, *Martinez-Villareal*, and *Slack* v. *McDaniel*. Those decisions cannot possibly be said to turn on the particular procedural vehicles that the petitioners in those cases employed to secure a ruling on the merits of their claims. This Court's decisions thus eschew reliance on the label attached to the filing said to be successive. *E.g.*, *Calderon* v. *Thompson*, 523 U.S. at 553-54. Indeed, in both *Martinez-Villareal* and *Slack*, the petitioner literally filed a "second" "application" (in the sense that each filed an application for a second time), but this Court nonetheless held that the application was not "second or successive" for purposes of Section 2244. It would take an extraordinary rhetorical stretch to nonetheless convert Petitioner's Rule 60(b) Motion, which contains no affirmative claims for relief *at all*, into a "successive" "application." Thus, it is clear that if a habeas petitioner files a Rule 60(b) motion

to seek consideration of claims that the district court previously deemed unripe (as in *Slack*) or unexhausted (as in *Martinez-Villareal*), that motion is *not* a "second or successive" application.[11]

The proper inquiry under this Court's precedents is accordingly whether (a) the petitioner seeks to present "new claims or evidence" and, if not, (b) whether the district court previously considered those claims on the merits. When, as in this case, "the only claim[s] on which [the petitioner] now seeks relief [are those] that he presented to the District Court, along with a series of other claims, in [his original application]," and the petitioner "[did] not receive an adjudication of his claim[s]," the "successive application" provisions are inapplicable. *Stewart* v. *Martinez-Villareal*, 523 U.S. at 643, 645. In this case, it is undisputed that *neither* of those criteria applies. Moreover, the analogy that this Court found compelling in *Martinez-Villareal* has even greater force in these circumstances. *Martinez-Villareal* explained that a petition which is re-filed after having been dismissed for failure to exhaust state remedies is not "successive," then concluded that the same rule should apply to claims that are re-filed after having been dismissed by the district court as unripe. 523 U.S. 644-45. Here, the analogy to the exhaustion doctrine is even more direct. The district court refused to consider the TN Rule 39 claims because Petitioner had "failed to exhaust" those claims; it held them "procedurally defaulted" only "because Petitioner has no remedy currently available in state court." Pet. App. E16.

3. The Sixth Circuit's holding should be rejected for the further reason that it raises a grave question under the Constitution's Suspension Clause, Art. I, § 9, cl. 2. Here, as in *INS* v. *St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2279 n.13 (2001), "The fact that this Court would be

[11] At bottom, this Court's precedents illustrate that the lower courts in this case were misguided in focusing on the procedural mechanism Petitioner invoked – Fed. R. Civ. P. 60(b) – rather than on the substance of the relief he requested. Under *Martinez-Villareal* and *Slack* v. *McDaniel*, Petitioner would have been perfectly entitled to seek relief by filing an entirely separate habeas application limited to the TN Rule 39 Claims, because those claims had been raised before but never decided on their merits.

required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely." Because a determination that Congress intended to repeal the authority of federal courts to consider the merits of a federal constitutional claim on habeas corpus would raise "a serious and difficult constitutional issue," this Court requires "a clear and unambiguous statement" of congressional intent. 121 S. Ct. at 2282.

The Sixth Circuit's decision directly implicates the Suspension Clause because it not only categorically precludes any district court from considering the merits of Petitioner's claims but similarly would appear to prohibit any court of appeals and even *this Court* from considering them as well. In other words, on the Sixth Circuit's view, Section 2244 prevents Petitioner from seeking relief in *any forum*. The bar to considering "successive petitions" thus appears to apply to all writs of habeas corpus, including those issued by this Court and its Justices, because those writs are issued pursuant to 28 U.S.C. 2254. See 28 U.S.C. 2244(b)(1) (any "second or successive" petition under Section 2254 presenting same claims as initial petition must be dismissed). The Sixth Circuit's decision thus crosses the line drawn by this Court in *Felker* v. *Turpin*, 518 U.S. 651 (1996). *Felker* sustained AEDPA's successive petition provisions as applied in that case to interpose the court of appeals as a gatekeeper, leaving this Court's power to grant original writs of habeas corpus intact, as "within the compass of [the] evolutionary process" of this Court's "abuse of the writ" jurisprudence. 518 U.S. at 664. By contrast, as authoritatively construed by the Sixth Circuit in this case, AEDPA represents a complete break from the "abuse of the writ" doctrine, prohibiting consideration on habeas of claims that have never been addressed "on the merits." Compare Rule 9(b), Rules Governing Habeas Corpus

Proceedings (pre-AEDPA) ("A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief *and the prior determination was on the merits* * * *." (emphasis added)).[12]

Because the Sixth Circuit's holding that Petitioner's Rule 60(b) Motion is a "second or successive" application conflicts with this Court's precedents, certiorari should be granted.[13]

III. If This Court Agrees That Petitioner's Rule 60(b) Motion Is A Prohibited "Second Or Successive" Application, Then The Sixth Circuit Abused Its Discretion By Failing To Remand This Case To The District Court For Application Of TN Rule 39.

1. If this Court holds that Petitioner was not entitled to pursue the TN Rule 39 Claims through his Rule 60(b) Motion, that does not end the matter. Question 2 presented by this Petition seeks review of the court of appeals' failure to remand this case to the district court for further consideration in light of the Tennessee Supreme Court's promulgation of Rule 39. Certiorari is warranted on that question because the lower courts are often presented with critical intervening developments of state law while a case is pending, but have not applied uniform rules in accounting for those developments. In addition, Questions 1 and 2 presented by this Petition are closely bound together because any adverse ruling on the Rule 60(b) issue will likely

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[12] For similar reasons, the Sixth Circuit's holding raises serious questions under the Due Process Clause and Article III of the Constitution, including the Exceptions Clause. Petitioner also maintains that, if he is not permitted to pursue any of the avenues of relief he asserts – a Rule 60(b) Motion, a remand by the court of appeals, or an extraordinary writ from this Court – then the provisions of the AEDPA relating to "second or successive" habeas corpus applications violate the Suspension and Due Process Clauses of the Constitution.

[13] Even if Petitioner's Rule 60(b) Motion were a "second or successive" habeas application, the Sixth Circuit nonetheless erred in furthermore holding that it was prohibited under AEDPA. See Pet i (Question 1). The proceedings on appeal in this case were governed by AEDPA. See *Slack* v. *McDaniel*, *supra*. But the proceedings *in the district court*, where the Motion was filed, were governed by pre-AEDPA law because AEDPA is not retroactive. See *Lindh* v. *Murphy*, 521 U.S. 320 (1997); see also *Coss* v. *Lackawanna County, DA*, 204 F.3d 453, 461 (CA3 2000) (en banc) (when "all the claims" in later application were "asserted in a petition filed prior to AEDPA's effective date," "pre-AEDPA requirements govern"), *rev'd on other grounds*, 532 U.S. 394 (2001).

turn on the fact that Rule 60(b) motions are generally filed after a case becomes "final," an event that has special significance in the habeas context. Such a ruling would leave open, however, the proper disposition of a case, such as this one, in which the grounds for the motion arose and were invoked before finality attached.

Petitioner sought a remand when the case returned to the Sixth Circuit after this Court denied certiorari as to the 2001 Cert. Petition, but before the court of appeals issued its mandate. In other words, Petitioner requested a remand (just as he filed his Rule 60(b) Motion) *before* a final judgment was entered against him.

The Sixth Circuit's refusal to remand this case constituted a grave abuse of discretion for the straightforward reason that the court of appeals, immediately prior to denying the remand, held that Petitioner had *no avenue* to pursue the TN Rule 39 claims in district court. In other words, through no fault of his own, Petitioner would be denied any opportunity to have his claims considered "on the merits." Petitioner is uniquely entitled to such extraordinary relief because a determination that Petitioner is forbidden from pursuing the TN Rule 39 claims would contravene fundamental premises animating the writ of habeas corpus. Decisions such as *Martinez-Villareal* and *Slack* v. *McDaniel*, *supra*, reiterate the basic premise of the writ of habeas corpus – that a state prisoner is entitled to have his claims of federal constitutional violations considered once "on the merits." Manifestly, that premise takes on even greater significance when, as in this case, the prisoner has been sentenced to death and a federal district court (by finding extraordinary prejudice from the failure of his counsel to present *any* mitigating

evidence at sentencing) has already called that sentence squarely into doubt on federal constitutional grounds.[14]

To be sure, other precedents establish an important competing premise in habeas jurisprudence – that the prisoner is entitled to have his claims considered on the merits only if he properly presents those claims to the state courts. This Court recently explained the basis of the exhaustion doctrine as follows:

> The exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment. This requirement "is principally designed to *protect the state courts' role* in the enforcement of federal law and prevent disruption of state judicial proceedings." The exhaustion rule promotes comity in that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."

Duncan v. *Walker*, 533 U.S. 167, 178-79 (2001) (quoting *Rose* v. *Lundy*, 455 U.S. 509, 518-19 (1982) (emphasis added)). As applied to this case, the district court relied on a presumption, *intended to protect the interests of the Tennessee Supreme Court*, that a petition for discretionary review to a state supreme court is an available means of "exhausting" state remedies for purposes of federal habeas corpus. On that view, because Petitioner did not sufficiently present the TN Rule 39 Claims in an application for discretionary review to the Tennessee Supreme Court, those claims were not exhausted and thus were defaulted.

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[14] Petitioner recognizes, of course, that a divided panel of the Sixth Circuit reversed that decision and this Court, upon Respondent's objection that the case was fact-bound, denied certiorari. Petitioner's point is that the district court's finding of a constitutional violation, at the very least, raises substantial doubts about the propriety of his death sentence. The district court reached that conclusion only after hearing and considering an extraordinary array of evidence, and furthermore producing an exceedingly detailed opinion explaining the basis for its conclusions. See Pet. App. E1-E59. The Sixth Circuit majority reversed that factual determination *sua sponte*, without any briefing or argument, and with only two sentences of explanation. See *supra* at 6. In addition, Respondent has never contested that the panel majority's opinion was *rife* with legal and factual errors. See Pet. App. H18-H19.

But when a habeas petitioner *has* properly presented his claims, *Martinez-Villareal* and *Slack* v. *McDaniel* establish that the prisoner's right to vindicate his federal constitutional claims a single time on the merits in federal court through federal habeas – a right established both by the Constitution and by federal law – takes precedence. In this case, the asserted basis for forbidding Petitioner from vindicating the TN Rule 39 Claims on the merits – the exhaustion doctrine – is precisely the subject of his Rule 60(b) Motion. The Tennessee Supreme Court has categorically and unambiguously established that the Tennessee courts deem "denial of relief by the Court of Criminal Appeals * * * exhaustion of state remedies for federal habeas corpus." TN Rule 39. Thus, no interest in "comity" or the "state courts' role" (*Duncan* v. *Walker*, *supra*) is served by refusing to permit the district court to consider Petitioner's Rule 39 Claims on the merits for the first time. The only effect of such a prohibition is to disserve profoundly the long-standing interests protected by the venerable writ of habeas corpus.

Furthermore, the constitutional claims presented by Petitioner's Rule 60(b) Motion are indisputably substantial. The assistant district attorney who prosecuted Petitioner's capital case has a well-documented history of serious misconduct. See Pet. App. J1-J4. In Petitioner's case, this prosecutor engaged in a fraudulent and deceptive scheme of withholding evidence and making misrepresentations. As outlined in Appendix I, the prosecutor's misconduct included: the withholding of exculpatory (*Brady*) material and information; misleading statements to defense counsel concerning the crucial forensic blood evidence in the case, thereby raising doubt about whether Petitioner was the actual assailant; fraudulent and prejudicial misrepresentations to the state mental health evaluators regarding the circumstances of the offense and Petitioner's mental state and background; fraudulent and prejudicial misrepresentations to defense counsel about the nature of Petitioner's prior murder conviction; improper presentation of inadmissible

and prejudicial evidence to the jury at trial, which the Tennessee Supreme Court previously characterized as "border[ing] on deception" (*State* v. *Jones*, 789 S.W.2d 545, 552 (Tenn. 1990)); improper coaching and manipulation of witnesses; and improper jury argument that the prosecutor must have known was false based on information contained in his own files. As a consequence of the prosecutorial misconduct, especially when combined with the deficient performance of defense counsel, the state presented a prejudicially false and misleading case to the jury.

2. Particularly relevant for purposes of this Court's certiorari determination, the question of when a court of appeals abuses its discretion in refusing to grant rehearing and remand the case for consideration of a critical question of law, while broadly important, cannot give rise to a circuit conflict because, by definition, it can be considered only in this Court in the first instance. This Court apparently granted certiorari in *Calderon* v. *Thompson*, *supra*, to consider a similar issue based on the question's broad importance. The same rationale justifies certiorari as to Question 2 in this case.

It nonetheless bears noting that the Sixth Circuit's refusal to grant rehearing and remand cannot be reconciled with decisions of other circuits granting similar relief in far less compelling circumstances. Those courts apply the principle that a case must be decided according to the law as it then exists, including by accounting for intervening developments. Here, by contrast, the Sixth Circuit refused to remand the case and issued its mandate despite the vital intervening development of TN Rule 39. Thus, as long ago as *Alphin* v. *Henson*, 552 F.2d 1033 (per curiam), *cert. denied*, 434 U.S. 823 (1977), the Fourth Circuit considered a motion for leave to file a second petition for rehearing filed by the plaintiffs in an antitrust action alleging monopolization at the Hagerstown, Maryland regional airport. The plaintiffs had obtained

injunctive relief from the district court but – because they could not prove damages – had been unsuccessful in their claim for attorney's fees. The plaintiffs appealed the denial of the attorney's fees to the Fourth Circuit, which affirmed the denial but stayed the issuance of its mandate while plaintiffs filed for certiorari. While plaintiffs' petition for certiorari was pending in this Court, the President signed the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which, *inter alia*, provided for the award of attorney's fees in antitrust cases in which "the plaintiff substantially prevails." 552 F.2d at 1034. This Court denied certiorari, but plaintiffs filed a motion for leave to file a second petition for rehearing in the court of appeals, based on the changes effected by the Hart-Scott-Rodino Act, before the Fourth Circuit received the order denying certiorari.

The Fourth Circuit stayed its mandate to consider plaintiffs' second petition for rehearing. Acknowledging that the plaintiffs would have been entitled to attorney's fees if the Hart-Scott-Rodino Act had been in effect when the district court issued its opinion, the court of appeals explained that "[i]t is an established principle 'that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'" 552 F.2d at 1034 (quoting *Bradley* v. *Richmond Sch. Bd.*, 416 U.S. 696 (1974)). The court concluded that its previous decision, in which it affirmed the denial of attorney's fees, was "not final" and should be amended "to make it conform to the law which now exists." *Id.* at 1035. It therefore granted both the plaintiffs' motion for leave to file a second petition for rehearing and their petition for rehearing, withdrew its earlier opinion, and "reverse[d] that portion of the district court's judgment and remand[ed] the case with directions to grant appropriate attorneys' fees in accordance with the 1976 Act." *Id.* at 1036.

The Ninth Circuit adopted a similar course in *Bryant* v. *Ford Motor Co.*, 886 F.2d 1526 (CA9 1989), *cert. denied*, 493 U.S. 1076 (1990), a product liability case initially brought in a California state court against Ford and various unnamed defendants. Ford had removed the case to federal court, where a district judge granted Ford's motion for summary judgment. Relying on Ninth Circuit precedent holding that the presence of unnamed defendants defeated diversity jurisdiction, the court of appeals overturned the grant of summary judgment on the ground that the district court lacked subject matter jurisdiction to enter summary judgment. *Id.* at 1527. The court of appeals stayed its mandate while Ford filed a petition for certiorari, which this Court granted in October 1988. In November 1988, the removal statute was amended to provide that the presence of unnamed defendants did not defeat jurisdiction. This Court subsequently vacated its order granting certiorari and denied Ford's petition.

Following the denial of certiorari, but prior to the Ninth Circuit's receipt of this Court's order, Ford filed a motion to stay the mandate, followed by a motion to extend the stay of the mandate and vacate the Ninth Circuit's earlier decision overturning the grant of summary judgment in Ford's favor. The Ninth Circuit granted Ford's motion and vacated its earlier opinion. It explained that

> Congress's action while this case was pending on certiorari justifies a stay of the mandate, and we choose to exercise our discretion to do just that in this case. Congress's enactment of the Act after the Supreme Court had granted certiorari conceivably deprived Ford of its day in court before the Supreme Court. . . . Justice demands that Fords' [*sic*] arguments for the affirmance of the district court's summary judgment receive a judicial forum.

Id. at 1530; see also *First Gibraltar Bank* v. *Morales*, 42 F.3d 895,897 (CA5 1995) (per curiam) (in case regarding preemptive effect of federal banking laws, vacating earlier opinion reversing district court judgment and issuing new opinion affirming judgment in accordance with new federal statute issued shortly before this Court denied certiorari; court explained that its

"mandate has not yet issued in this appeal, and 'the normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision'" (quoting *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 247 (1982))).[15]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 18, 2002

[15] This Court's decision in *Calderon* v. *Thompson*, *supra*, is not to the contrary. That case involved a court of appeals' *recall* of its mandate to "revisit the *merits* of its earlier decision denying habeas relief." 523 U.S. at 557. Once the merits have been decided and the mandate has issued, the Court concluded, "the State is entitled to the assurance of finality" (*id.* at 556) unless the petitioner could make "a strong showing of actual innocence" (*id.* at 558). Here, by contrast, Petitioner neither sought to recall the mandate (which had not issued) nor to have the lower courts reconsider the merits of his claims (which, for procedural reasons, had never been considered).

(ORDER LIST: 535 U.S.)

MONDAY, APRIL 8, 2002

ORDER IN PENDING CASE

01-9094 (01A702) ABDUR'RAHMAN, ABU-ALI. V. BELL, WARDEN

The application for stay of execution of sentence of death presented to Justice Stevens and by him referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

CAPITAL CASE - EXECUTION DATE: 4/10/02 1:00 a.m.

No. 01-A702

In The
Supreme Court of the United States

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MAR 19 20
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell,

Respondent.

MOTION FOR A STAY OF EXECUTION

For the reasons set forth in the accompanying Petition for a Writ of Certiorari, Petitioner Abu-Ali Abdur'Rahman respectfully requests that this Court enter an order staying the execution of sentence of death pending the disposition of the Petition and, if the Petition is granted, until the issuance of the mandate of this Court.

Respectfully submitted,

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March 18, 2002

Nos. 01-9094 & 9095

In The
Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell,

Respondent.

In re Abu-Ali Abdur'Rahman,

Petitioner.

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SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

The undersigned certifies that he has this 18th day of March, 2002, served a copy of the foregoing petition for a writ of certiorari, petition for an original writ of habeas corpus, motions for a stay of execution, and motions for leave to proceed *in forma pauperis* upon the below-named counsel for respondent by facsimile, Federal Express, and first-class mail, postage prepaid, and furthermore certifies that all persons required to be served have been served:

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20th Judicial District
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Thomas C. Goldstein

CAPITAL CASE – EXECUTION DATE: 4/10/02 1:00 a.m.

Nos. 01-___ & ___

In The
Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell,

Respondent.

In re Abu-Ali Abdur'Rahman,

Petitioner.

On Petitions for
a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and
an Original Writ of Habeas Corpus and Other Extraordinary Relief

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APPENDIX

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March 18, 2002

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J. *State* v. *Abu-Ali Abdur'Rahman (formerly James Lee Jones): Court Reprimands of Zimmermann* (attached as Appendix D to Memorandum in Support of Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (filed with U.S. Dist. Ct. for the Middle Dist. of Tenn. Nov. 2, 2001))

NOT RECOMMENDED FOR PUBLICATION

FILED

Nos. 98-6568/6569, 01-6504

JAN 1 8 2002

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

ABU-ALI ABDUR'RAHMAN, Petitioner-Appellant, v. RICKY BELL, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Before: SILER, BATCHELDER and COLE, Circuit Judges.

SILER, Circuit Judge. This matter comes before the court on the application by Abdur' Rahman for a certificate of appealability, a request that his Fed.R.Civ.P. 60(b) appeal be heard initially en banc and a motion to consolidate his Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 to withhold mandate, grant a rehearing en banc, and remand. For the reasons stated hereafter, insofar as we have the authority, the motions are denied.

His application for a certificate of appealability arises from the transfer by the district court of this matter after he had applied for relief from judgment under Fed.R.Civ.P. 60(b). Petitioner moved the district court for relief from judgment under Rule 60(b) based upon the fact that Tennessee Supreme Court Rule 39 was just adopted on June 28, 2001, in which it stated:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error.

> Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tenn. Code. Ann. § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

The petitioner raised it in a Rule 60(b) motion because this case was appealed to the Tennessee Supreme Court after 1967 and the district court in this case found that certain claims were barred by the failure of the petitioner to seek discretionary review from the Tennessee Supreme Court. ***See Abdur'Rahman v. Bell***, 999 F. Supp. 1073, 1080-82 (M.D. Tenn. 1988). The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas corpus petition, ***see McQueen v. Scroggy***, 99 F.3d 1302, 1335 (6th Cir. 1996), so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gateway criteria of 28 U.S.C. § 2244(b).

We consider that this is the equivalent of a successive habeas corpus petition, so it is necessary to determine whether the petition meets the criteria of 28 U.S.C. § 2244(b)(2). Abdur'Rahman has not been able to meet these criteria. First, he does not rely upon a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. Second, there is no factual predicate for the claim which could not have been discovered previously through the exercise of due diligence. Finally, he does not show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense charged. Instead, his argument rests upon a state procedural rule, adopted three years after the district court's judgment. The district

court properly found that the claims were then unexhausted for failure to present them before the Tennessee Supreme Court under the authority of ***Silverburg v. Evitts***, 993 F.2d 124, 126 (6th Cir. 1993). In addition, the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default. ***See Abdur'Rahman v. Bell***, 226 F.3d 696 (6th Cir. 2000).

Therefore, the application for a certificate of appealability is denied. The motions or requests that the Rule 60(b) appeal be heard initially en banc and to consolidate the Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied.

NOT RECOMMENDED FOR PUBLICATION

Nos. 98-6568/6569; 01-6487; 01-6504

FILED

FEB 11 2002

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR RAHMAN,

Petitioner - Appellant.

v.

RICKY BELL, Warden,

Respondent - Appellee.

ORDER

Before: SILER, BATCHELDER, and COLE, Circuit Judges

These cases are before the court upon the motions of the petitioner to withhold issuance of the mandate in Nos. 98-6558/6569, the appeal and cross-appeal from the decision of the district court on the application for a writ of habeas corpus, and to rehear the cases en banc or remand to the district court for further proceedings. Petitioner has also moved that the court hear en banc No. 01-6504, his appeal from the judgment of the district court finding his Rule 60(b) motion to be a second or successive habeas corpus petition subject to 28 U.S.C.§2244 and transferring it as such to this court, and to consolidate it with the pending motions in Nos. 98-6568/6569, the latter request having been the subject of a supplemental motion filed February 8, 2002. Additionally, petitioner has asked for rehearing en banc of the panel's January 18, 2002 order denying, inter alia, his request for a certificate of appealability in No. 01-6504; petitioner has supplemented

that request for en banc review with a statement of additional authority. Finally, petitioner has applied for leave to file a new habeas corpus petition in No. 01-6487.

The requests for en banc consideration have not been favored by a majority of the active judges of the court, and the matter is referred to the original panel. Upon consideration of the pleadings noted above, it is the decision of the court that:

- Petitioner's motion for rehearing of Nos. 98-6568/6569 is hereby DENIED
- Petitioner's motion to consolidate No. 01-6504 with Nos. 98-6568/6569 is hereby DENIED
- The mandate of the court in Nos. 98-6568/6569 shall issue forthwith
- The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction
- The motions for initial hearing en banc of No. 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter are hereby DENIED
- The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in No. 01-6487, is DENIED. As we stated in an opinion filed in Nos. 98-6568/6569; 01-6504 on January 18, 2002, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default."

With this order the court's review of Nos. 98-6568/6569, 01-6487, and 01-6504 is hereby concluded.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL, Warden	)	DEATH PENALTY

ORDER

Pending before the Court is Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 254). Because the Motion is a second or successive petition subject to 28 U.S.C. § 2244, this case is transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).

Petitioner, in this capital habeas corpus case, has moved pursuant to Fed. R. Civ. P. 60(b) for relief from this Court's Judgment of April 8, 1998 (Docket Nos. 205 and 206). Abdur'Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998), aff'd. in part and rev'd. in part, 226 F.3d 696 (6th Cir. 2000), cert. denied, 122 S.Ct. 386 (2001), pet. for reh'g pending. The Rule 60(b) Motion is predicated upon a new Tennessee Supreme Court Rule, Rule 39 ("Rule 39"), adopted on June 28, 2001.[1]

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[1] Tennessee Supreme Court Rule 39 reads as follows:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim (continued...)

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In the 1998 Judgment, this Court ruled that certain of Petitioner's claims had not been exhausted in state court and, therefore, were defaulted. Based on new Rule 39, Petitioner asserts that a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes and, therefore, the claims in question were exhausted and the Court must now rule on the merits of those claims.

Respondent asserts that this Rule 60(b) Motion is actually a second or successive petition subject to 28 U.S.C. § 2244. The proper procedure, according to Respondent, is for this Court to transfer the matter to the Sixth Circuit for its determination of whether the Rule 60(b) Motion satisfies the gateway criteria of 28 U.S.C. § 2244(b). Respondent relies primarily on McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996). In McQueen, the Sixth Circuit held "[w]e agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition...." Id. See, also, United States v. Rich, 141 F.3d 550, 551 (5th Cir. 1998); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (en banc); Felker v. Turpin, 101 F.3d 657, 660-61 (11th Cir. 1996); and United States v. Hernandez, 158 F.Supp.2d 388, 391 (D. Del. 2001).

Petitioner argues that this Rule 60(b) Motion is not a second or successive petition because it raises no new claims, no new facts, and does not rely on new law. Petitioner relies primarily on Rodriquez v. Mitchell, 252 F.3d 191, 198-200 (2nd Cir. 2001). In Rodriquez, the Second Circuit held "a Motion under Rule 60(b) to vacate a judgment denying habeas is not a

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[1](...continued)
presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Tenn. S. Ct. R. 39.

second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)." Id. at 198.

In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition. McQueen v. Scroggy, 99 F.3d at 1334-35. 28 U.S.C. § 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

Because this Rule 60(b) Motion presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court's Judgment, the Court finds that the Motion is a second or successive habeas petition subject to 28 U.S.C. § 2244. Accordingly, this Court is without jurisdiction to decide the Rule 60(b) Motion. The case is hereby transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).

It is so ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL, Warden	)	DEATH PENALTY

ORDER

Pending before the Court is Petitioner's Application for Certificate of Appealability (Docket No. 269). For the reasons described herein, the Court is without jurisdiction to rule on the Application.

By Order (Docket No. 267) entered on November 27, 2001, the Court ruled that it was without jurisdiction to decide Petitioner's Rule 60(b) Motion because the Motion was a second or successive petition subject to 28 U.S.C. § 2244. The Court, accordingly, ordered the case transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).[1]

Petitioner's Application for Certificate of Appealability asks the Court to grant a certificate of appealability. See 28 U.S.C. §§ 2253(c); Fed. R. App. P. 22(b); Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). According to Petitioner:

> Specifically, a COA should issue because reasonable jurists could disagree (and have disagreed) with this Court's conclusions that: (1) Every 60(b) motion in a habeas case is a second or successive

[1] The Court also notes that this case was on appeal at the time the Rule 60(b) Motion was filed in this Court and that it remains on appeal at this time. Therefore, the Court generally lacks jurisdiction over the case due to the appeal. See First Nat'l Bank of Salem, Ohio v. Hirsch, 535 F.2d 343 (6th Cir. 1976) regarding the procedure for a District Court to act on a Rule 60(b) motion to vacate a judgment that is on appeal.

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petition; (2) Tennessee Supreme Court Rule 39 is a "new" rule of law; and (3) Abu-Ali Abdur'Rahman is not entitled to relief, despite egregious prosecutorial misconduct, including deliberate falsification of evidence pivotal to the death sentence.

Application, Docket No. 269, p. 1.

For the reasons stated in the prior Order (Docket No. 267), the Court finds that it does not have jurisdiction to rule on Petitioner's Application for Certificate of Appealability.

The Clerk shall send a copy of this Order to the Clerk of the Sixth Circuit Court of Appeals.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL	)	

ORDER

Petitioner, Abu-Ali Abdur' Rahman, has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth in the accompanying Memorandum, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. Petitioner shall remain incarcerated as described in the Memorandum.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL	)	

MEMORANDUM

I. Introduction

Petitioner, Abu-Ali Abdur' Rahman[1], has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth below, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

The basis of the Court's opinion, as is described in detail herein, is that Petitioner was unconstitutionally sentenced to death because he did not receive the effective assistance of counsel guaranteed by the Sixth Amendment. This Court, along with the state post-conviction trial and appellate courts, finds that trial counsel for Petitioner failed to adequately represent their client. This Court further finds that Petitioner was seriously prejudiced by utterly ineffective assistance of counsel at his sentencing hearing. Trial counsel, for instance, failed to investigate

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[1] Petitioner has changed his name from James Lee Jones to Abu-Ali Abdur' Rahman.

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(20E)

and inform the jury about Petitioner's unstable mental history and bizarre family background. The jury, as a result, did not hear significant mitigating evidence before deciding whether to sentence Petitioner to death. This is not to suggest that Petitioner, or anyone with an unstable mental history or bad childhood, cannot be sentenced to death. However, a sentence of death must be imposed in accordance with the Constitution and in this case was not. This is not a case where counsel presented the jury with most of the available mitigation evidence and merely missed some evidence. This is not an instance of harmless error. Despite an abundance of mitigating evidence, there was virtually a complete failure by counsel to present a defense to the jury at Petitioner's sentencing. Accordingly, as is more fully discussed in Section VIII, Ineffective Assistance of Counsel, the Constitution has been violated and the writ of habeas corpus must issue as to Petitioner's death sentence.

II. Proceedings in the State Courts

Petitioner was tried and convicted of first degree murder, assault with intent to commit murder, and armed robbery. (Addendum 1, at 2000). After a subsequent sentencing hearing, Petitioner received the death penalty for the first degree murder conviction. The jury found the existence of three aggravating circumstances: (1) Petitioner had been convicted of prior violent felonies (assault with a deadly weapon and second degree murder); (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the Petitioner was engaged in committing or attempting to commit a first

degree murder or robbery. (Addendum 1, 1986-2001). The court sentenced the Petitioner to life on each of the other offenses, to be served consecutively to each other. (Addendum 1, at 13-14).[2]

Petitioner was represented at trial by Lionel Barrett and Sumter Camp. After trial, Mr. Barrett and Mr. Camp withdrew, and the state court appointed Richard Dinkins to represent Petitioner on direct appeal to the Tennessee Supreme Court. (Addendum 1, Technical Record, at 87). The Tennessee Supreme Court affirmed Petitioner's conviction and sentence. State v. Jones, 789 S.W.2d 545 (Tenn. 1990).

The state court appointed another attorney to assist Mr. Dinkins in the post-conviction proceedings, who was joined by a volunteer lawyer from the Capital Case Resource Center. (Addendum 11, Technical Record, at 23, 50, 82). The post-conviction trial court found trial counsel had been ineffective in their representation of Petitioner at sentencing. (Addendum 11, at 81-109). The court, however, went on to find that trial counsel's deficiencies did not result in prejudice to the Petitioner and rejected all other claims. (Id.) The Tennessee Court of Criminal Appeals[3] affirmed that judgment, and the Tennessee Supreme Court denied Petitioner's application for permission to appeal. Jones v. State, 1995 WL 75427, at *2 (Tenn. Crim. App. Feb. 23, 1995).

The post-conviction trial court gave the following summary of facts in its opinion:

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[2] The court also determined that, if the death sentence were to later be reduced to a life sentence, that sentence would be served consecutively to the other life sentences. (Addendum 1, at 14). In addition, the state sentences would be served consecutively to the federal sentence for which Petitioner was on parole when he was convicted of the state offenses. (Id.)

[3] The panel consisted of only two judges, rather than the usual three judges.

> The facts are that petitioner and his codefendant, Harold Deval Miller, went to the victims home. Petitioner wants to describe the events that took place after that as a misguided attempt to rid the community of drug dealers, as it appears that the victim, Patrick Daniels, was a small time marijuana dealer. Codefendant, Mr. Miller, testified for the State, however, and he described the motive for the visit as robbery. The victim, Patrick Daniels, lived with Norma Norman. Petitioner and Miller entered the home and bound Daniels and Norman. What happened next is described in the appellate decision.
>
> > The victim in this case was bound, gagged, and blind folded with duct tape. He was distressed, crying, and begging not to be hurt. Defendants stood over him and stabbed him six (6) times, four (4) times penetrating the heart. He then watched as the victim went into convulsions, blood spewing from his nose and mouth. His accomplice testified, "he was working himself up on a rhythm," he was "cool" and "under control." The victim continued to plead with the defendant as he was being stabbed.
>
> State v. Jones, supra, at 550. The defendant also stabbed Norma Norman numerous times, but she miraculously survived the attack.

(Addendum 11, 83-84).

III. Proceedings in this Court

Prior to the evidentiary hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(1), (4), C8) were unconstitutional. (Docket Nos. 123, 124). The Court granted summary judgment to the Respondent on the following claims: the Batson challenge (Amended Petition, at ¶ C2(2)); exclusion of jurors based on religious beliefs (¶¶ C2(3),(4)); failure to exclude certain jurors for cause (¶ C2(5)); sufficiency of evidence of robbery and first degree murder (¶ C3); inadequate proportionality review (¶ C9); prosecutor's questions during guilt phase (¶ D4); prosecutorial misconduct involving publication of indictments to jury (¶D6); cross examination

of Petitioner at sentencing (¶ D7); and State's argument at sentencing regarding the Southeastern Gospel Ministry (¶ D8(4)). (Docket Nos. 156, 157). The Court denied summary judgment on Petitioner's conflict of interest and ineffective assistance of counsel claims, having found the existence of a factual dispute. (Id.) The Court denied Respondent's motion for summary judgment on procedural default issues because Petitioner raised factual issues regarding actual innocence in response to the motion. (Docket Nos. 133, 134).[4]

IV. Procedural Defenses

A. Generally

Respondent argues that the Court should not reach the merits of several of Petitioner's claims because Petitioner failed to raise those claims in state court, and has, therefore, procedurally defaulted those claims. Petitioner argues that none of his claims are procedurally defaulted because: (1) all the claims Petitioner raises have been presented to the state courts; (2) the ineffectiveness of Petitioner's counsel in the state courts and prosecutorial misconduct provide cause for any failure to raise a claim; and (3) Petitioner is actually innocent of the crime for which he has been convicted, and of the death penalty.

Subsections (b) and (c) of 28 U.S.C. § 2254 require a habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court. If the petitioner has no remedy currently available in state court, however, the exhaustion requirement is satisfied. Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074, 2080 (1996); Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334 (1989).

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[4] Respondent also filed a Motion in Opposition to an Evidentiary Hearing (Docket No. 110), which the Court denied. (Docket No. 116).

Although a claim may be fully exhausted under these circumstances, the petitioner's failure to assert the claim in state court may constitute procedural default. Id. As a general rule, procedural default bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court. Id. A petitioner may avoid this procedural bar by showing cause for the default, and that prejudice resulted from the default, or by showing that he is actually innocent. Id.; Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

B. Exhaustion

First, Petitioner argues that his claims are not procedurally defaulted because they have all been exhausted. Exhaustion requires that petitioners "fairly presen[t]" federal claims to the state courts to provide them with an opportunity to correct alleged violations of its prisoners' federal rights. Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). A claim has been "fairly presented" if the petitioner identified the specific constitutional guarantee allegedly violated, as well as a statement of the facts which entitle the petitioner to relief. Gray, 116 S.Ct. at 2081.

It is not enough to make a general reference to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court. Gray, 116 S.Ct. at 2081.

Petitioner argues that many of his claims[5] are exhausted because the Tennessee Supreme Court had the independent duty to review each claim that could be based upon the record on appeal even if the claim was not raised by the Petitioner. Petitioner cites Tennessee Code Annotated Section 39-2-205(a), which was in effect at the time of Petitioner's trial, to support his argument.

That statute provided for automatic direct review by the Tennessee Supreme Court where the death penalty has been imposed. Tenn. Code Ann. § 39-2-205(a). The statute required that the court review the death sentence to determine: (1) whether the sentence was imposed in an arbitrary fashion; (2) whether the evidence supported the findings of an aggravating

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[5] Those claims are as follows: whether the indictments against Petitioner violated his Fifth, Eighth and Fourteenth Amendment rights (Amended Petition, ¶ C1); whether Petitioner was denied his rights under the Sixth, Eighth and Fourteenth Amendments because he was not permitted to question potential jurors in voir dire regarding their beliefs about parole eligibility (¶ C2(1)); whether the evidence was sufficient to support Petitioner's conviction of assault (¶ C3(3)); whether the trial court erred in instructing the jury that it could return a verdict finding Petitioner guilty of either premeditated murder, felony murder, or both (¶ C4(1)); whether voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation in a manner that violated Tennessee law (¶ C4(2)); whether the trial court erred instructing the jury regarding lesser included offenses (¶ C4(3)); whether the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (¶ C4(4)); whether the trial court gave an erroneous definition of reasonable doubt in its instructions to the jury by use of the language "moral certainty" (¶ C4(5); ¶ C7(3)); whether Tennessee law unconstitutionally prohibits presentation of certain specified issues at a capital sentencing hearing (¶ C5); whether the trial court unconstitutionally instructed the jury regarding the felony murder aggravating circumstance (¶ C7(2), ¶ C8); whether the trial court unconstitutionally instructed the jury that sympathy could not be a factor in its sentencing decision (¶ C7(5)); whether the sentencing instructions as a whole were unconstitutional (¶ C6); whether jury instructions regarding mitigating circumstances at the sentencing phase of the trial were unconstitutional (¶¶ C7(6),(7),(8),(9),(10),(11),(12),(13),(14),(15)); whether the Tennessee Death Penalty Statute is unconstitutional (¶ C10); whether the prosecution made improper closing argument at the guilt phase of trial regarding the term "pure pleasure" (¶ D5(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(1)-(3),(5)-(8)).

circumstance(s); (3) whether the evidence supported the finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance(s) so found; and (4) whether the death sentence is disproportionate to the penalty imposed in similar cases. Tenn. Code Ann. § 39-2-205(c) (repealed and replaced by Tenn. Code Ann. § 39-13-206(c)(1)).

The Court is not persuaded that this statute excuses the requirement that the Petitioner present issues to the state courts in the first instance, at least with respect to issues not specifically delineated in the statute. Accepting Petitioner's argument would essentially eviscerate the exhaustion requirement because defendants would have no incentive to raise issues in the state court. The exception Petitioner advocates would also undermine the principles of comity and federalism upon which the exhaustion requirement is based. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991). Accordingly, the statutory requirement that the Tennessee Supreme Court review a death sentence does not satisfy the exhaustion requirement as to those issues not addressed in the statute.[6]

Petitioner argues that the exhaustion doctrine does not require a petitioner to seek discretionary review of a claim before the state's highest court. Petitioner argues that presentation of claims to the Tennessee Court of Criminal Appeals on appeal of the denial of his post-conviction petition was sufficient for purposes of exhaustion because that was the last court to which he was entitled to appeal as of right. Although there is a split of authority on the issue, see Dolny v. Erickson, 32 F.3d 381, 383-84 (8th Cir. 1994)(and cases cited therein), the Sixth Circuit has held that a petitioner must seek discretionary review of a claim from a state's highest

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[6] Respondent does not allege that Petitioner's claims that track the statute are procedurally defaulted.

court in order to satisfy the exhaustion requirement. Silverburg v. Evitts, 993 F.2d 124, 126 (6th Cir. 1993). That the Tennessee Supreme Court exercises only discretionary review of post-conviction matters, therefore, does not excuse the Petitioner from raising his claims before that court.[7]

Petitioner argues other claims are exhausted for various reasons. First, Petitioner argues that he has exhausted his claim that the evidence at trial was insufficient to support his conviction of assault by presenting it to the Tennessee Supreme Court in his application for discretionary review. (Amended Petition, ¶ C3(3)). Petitioner contends that he presented this claim to the court because it is related to his argument that the evidence was insufficient to support premeditation and deliberation, in that both claims involve Petitioner's condition at the time of the offense. The Court is not persuaded, however, that this claim was fairly presented to the court simply because Petitioner's mental state was a basis for both claims. Thus, Petitioner's sufficiency of the evidence supporting assault claim has not been exhausted.

With respect to his claim that voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation (Amended Petition, ¶ C4(2)), Petitioner argues that he raised the substantial equivalent of this claim by arguing that the evidence was insufficient to support a finding of premeditation or deliberation under State v. Brown, 836 S.W.2d 530 (Tenn. 1992), a case involving jury instructions on these elements. Resolving a sufficiency of the evidence claim, however, does not require a court to determine

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[7] Petitioner contends that his ineffective assistance of appellate counsel claim (Amended Petition, ¶ F) is exhausted based on this argument. Given the Court's rejection of this argument, the exhaustion doctrine applies to bar this claim.

whether the court erred in its jury instructions. This claim was not fairly presented to the state court, and therefore, has not been exhausted.

Petitioner next argues that he has exhausted his claim that the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (Amended Petition, ¶ C4(4)). Petitioner contends that he raised the substantial equivalent of this claim by arguing to the Tennessee Supreme Court on direct appeal that it was fundamentally unfair to predicate his first degree murder conviction solely on the basis of the uncorroborated testimony of co-defendant Harold Devalle Miller. But, as stated above, resolving Petitioner's fundamental fairness claim would not require the court to review the jury instructions on this particular issue. Accordingly, this claim was not fairly presented to the state courts, and has not been exhausted.

Petitioner argues that his claim challenging the constitutionality of the Tennessee Death Penalty Statute (Amended Petition, ¶ C10) was raised on direct appeal to the Tennessee Supreme Court, because he stated in his brief:

> D. As Applied To The Facts Of This Case, The Imposition Of The Death Penalty Constitutes A Deprivation Of Due Process Of Laws, Equal Protection Of Laws And Cruel And Inhuman Treatment In Violation Of The Fifth, Eighth And Fourteenth Amendments To The United States Constitution And Article I, Sections Eight And Sixteen Of The Tennessee Constitution And, Further, Is Disproportionate To The Sentence Imposed In Similar Cases
>
> In addition to the arguments set forth in Section II A, B, C and D, supra., defendant submits that, taking this case as a whole, the imposition of the death penalty was improper and constitutes a deprivation of life without due process of law and cruel and inhuman treatment. . .

(Brief of the Appellant, at 59 (Addendum 2)). The brief then goes on to address the proportionality issue.

Despite the language in the heading, the brief does not specify, "as applied to the facts of this case," why the death penalty statute is unconstitutional, and what facts support the constitutional challenge. Under these circumstances, the Court concludes that Petitioner did not fairly present his constitutional challenge to the Tennessee Supreme Court on direct appeal.

Petitioner also points out that he challenged the "heinous, atrocious and cruel" aggravating circumstance in his post-conviction application for permission to appeal to the Tennessee Supreme Court. In a footnote, the brief states: "By discussing only the aggravating circumstance of 'heinous, atrocious or cruel,' *infra*, the Appellant does not waive any previously raised constitutional challenges. The Appellant relies on the arguments previously advanced and ruled upon in his Brief to the Court of Criminal Appeals." (Application For Permission To Appeal, at 21 n.11 (Addendum 15)).

Although the Petitioner referred, in this footnote, to the brief he filed in the Court of Criminal Appeals, he did not attach a copy of that brief to the Application. The Court is not persuaded that referral to arguments made in another document by way of a footnote constitutes a fair presentation of those arguments to the Tennessee Supreme Court. Thus, the Court concludes that this claim has not been exhausted.

In his Amended Petition, Petitioner alleges a number of instances of prosecutorial misconduct, numbered one through eight, with several subissues under each number. In a paragraph under the main heading "Prosecutorial Misconduct," Petitioner states that the prosecution "pursued a consistent course of deception," which violated Petitioner's constitutional

rights (Amended Petition, (¶ D)). Respondent has asserted a procedural default defense to most of the claims set forth under this heading.

Petitioner argues, however, that the heading "prosecutorial misconduct," along with the paragraph following that heading, constitute a separate claim to which the Respondent has not asserted a procedural default defense. But the Court does not view this paragraph as a separate claim. The paragraph does not allege specific constitutional violations, nor does it set forth specific facts in connection with those alleged violations. Therefore, Respondent will not be considered to have waived his procedural default defense to the prosecutorial misconduct claims.

For this same reason, the Court rejects Petitioner's argument that certain specific allegations are not defaulted because they fall within this general prosecutorial misconduct claim.[1]

Petitioner contends that his claims regarding the failure to disclose co-defendant Miller's pretrial statements (Amended Petition, ¶¶ D1(2) -(4)) were fairly raised to the Tennessee Supreme Court in his application for permission to appeal because, in that application, he argued that the prosecution made misleading statements in its argument to the jury. (Application For

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[1] These claims include: whether the prosecution should have disclosed the statements of Norman's children (¶ D1(5)), the redacted portion of Detective Garafola's Report (¶ D1(6)), other police reports (¶ D1(8)), the memorandum in the prosecution's file concerning a bank account in Patrick Daniels' name (¶ D1(9)), the statement of George Daniels/laboratory reports (¶¶ D1(10)(11)), and information regarding Petitioner's bank account (¶ D1(12)). These claims also include whether the prosecution unconstitutionally influenced Harold Devalle Miller's testimony (¶ D2(1)); whether the prosecution provided false information to MTMHI (¶ D2(2)); whether the prosecution improperly attempted to manipulate Norma Norman's testimony (¶ D2(3)); whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's 1972 murder conviction (¶ D3); whether the prosecution made improper closing arguments at the guilt phase of trial (¶¶ D5(1)-(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(1)-(3),(5)-(8)).

Permission To Appeal, at 9 (Addendum 15)). The Petitioner also argued that the prosecution committed discovery violations, but did not mention Miller's pretrial statements.

The Court is not persuaded that this discovery violation claim has been fairly presented to the Tennessee Supreme Court. Determining whether a prosecutor has made a misleading closing argument is not the same as determining whether the prosecution committed a discovery violation. Thus, Petitioner has not exhausted this claim.

Petitioner next contends that he has exhausted his claim that the prosecution provided misleading statements to the Middle Tennessee Mental Health Institute ("MTMHI"). (Amended Petition, ¶ D2(2)). Petitioner argues that he raised his claim in his application for permission to appeal to the Tennessee Supreme Court by reciting the facts upon which the claim is based. Although Petitioner discussed the prosecutor's letter to MTMHI in the "Statement of the Facts" section of the application, he did not raise this issue in arguing that the prosecution had engaged in misconduct. (Application For Permission To Appeal, at xii-xiii, 7-19 (Addendum 15)). The prosecutorial misconduct claims presented to the Tennessee Supreme Court were limited to Petitioner's allegations that the prosecution failed to disclose certain documents in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the prosecution made a misleading closing argument. (Id.) Although Petitioner alleged facts regarding the prosecution's letter to MTMHI, he did not identify the constitutional violation allegedly shown by those facts. Thus, this claim was not fairly presented to the Tennessee Supreme Court, and has not been exhausted.

Respondent argues that Petitioner's ineffective assistance of counsel claim is procedurally defaulted except as to the claim that defense counsel conducted a deficient investigation of

Petitioner's mental history (Amended Petition, ¶¶ E1-E2(g)). Petitioner raised the ineffective assistance of counsel claim in his post-conviction petition, and described twenty-seven alleged deficiencies by defense counsel. (First Amended Petition For Post-Conviction Relief, at 3-6 (Addendum 11)). As noted above, the trial court held that defense counsel conducted an inadequate investigation of Petitioner's background and mental health history, but determined that Petitioner was not prejudiced by that deficiency. (Memorandum and Order of the Fifth Circuit Court For Davidson County (Addendum 11)). The Court of Criminal Appeals agreed with that assessment. Jones v. State, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995).

In his application for permission to appeal to the Tennessee Supreme Court, Petitioner argued that prejudice had been shown. (Application For Permission To Appeal, at 1-6 (Addendum 15)). Because Petitioner succeeded in demonstrating that trial counsel's performance was deficient in the lower courts, it was not necessary for the Petitioner to raise all those deficiencies again in arguing that his appeal of the prejudice issue should be accepted. The Court concludes that Petitioner fairly presented the ineffective assistance of counsel claims to the Tennessee Supreme Court.[9]

In conclusion, the only claims that have been exhausted by Petitioner and remain to be decided by this Court are: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1), (7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance

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[9] For the same reason, the Court also concludes that Petitioner has exhausted his claim that trial counsel failed to test the adversarial process. (Amended Petition, ¶ A).

(Amended Petition, ¶¶ A, E1-E2(g)).[10] With the exception of these claims, Petitioner has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. Petitioner may no longer present those claims to the state court, however, because they would be barred by the statute of limitations. See Tenn. Code Ann. § 40-30-202.[11] Thus, because Petitioner has no remedy currently available in state court, these claims are procedurally defaulted. See Hannah v. Conley, 49 F.3d 1193, 1196-97 (6th Cir. 1995).

C. Cause and Prejudice

Petitioner argues that even if his claims are the subject of procedural default, the default should be excused because he can establish cause for the default, and that prejudice resulted from the default. Petitioner also argues that the default should be excused to prevent a fundamental miscarriage of justice in that he is actually innocent.[12]

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[10] Respondent has asserted a procedural default defense as to Petitioner's claim that the cumulative effect of all errors at trial violated Petitioner's due process rights. (Amended Petition, ¶ B). In his brief, Petitioner indicates that this is not a separate claim for habeas relief, but is an argument to be considered in determining whether the state court's alleged errors should be considered harmless. Therefore, the Court will not consider this argument as a separate claim.

[11] Section 40-30-202(a) is part of the Post-Conviction Procedure Act of 1995, Tenn. Code Ann. §§ 40-30-201, et seq. With some exceptions not applicable here, Section 202(a) provides that a petition for post-conviction relief must be brought within one year of the date of the final action of the highest state appellate court to which an appeal is taken. The previous post-conviction statute required that a petition be filed within three years of the date of the final action of the highest state appellate court to which an appeal was taken. Tenn. Code Ann. § 40-30-102 (repealed 1995).

The Tennessee Supreme Court denied Petitioner's petition to rehear, on direct appeal, on May 14, 1990. (Addendum 7). Therefore, Petitioner would be barred, under either statute, from seeking to raise these claims through a post-conviction proceeding in state court.

[12] Petitioner also argues that certain state procedural rules should not prevent (continued...)

In order to establish cause, a petitioner must show the procedural default was the result of ineffective assistance of counsel, or "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A petitioner may rely on ineffective assistance of counsel to establish cause only if he has presented that claim to the state courts as an independent constitutional claim, and he shows that counsel's incompetence rises to the level of a constitutional violation. 106 S.Ct. at 2645-46.

In order to demonstrate that an objective impediment provided cause for a procedural default, a petitioner may show, for example, that "the factual or legal basis for a claim was not reasonably available to counsel," or that "'some interference by officials'" made compliance with the procedural rule impracticable. Murray, 106 S.Ct. at 2645 (citations omitted).

The cause and prejudice standard applies to claims that were defaulted on appeal as well as those defaulted at trial. Murray, 106 S.Ct. at 2646.

In this case, Petitioner has presented an independent ineffective assistance of trial counsel claim that is not procedurally defaulted. Petitioner has not specified, however, any errors made by trial counsel that prevented any issues from being raised on appeal. In other words, in reviewing Petitioner's case on direct appeal, the Tennessee Supreme Court did not dismiss any of

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(...continued)
adjudication of claims by this Court. It does not appear, however, that Respondent relies on state procedural rules to bar Petitioner's claims. Instead, Respondent argues that the claims at issue were not raised at all in the state courts. See Teague, 109 S.Ct. at 1069; Coleman v. Thompson, 111 S.Ct. at 2557 n. 1.

Petitioner's claims based on the failure of trial counsel to preserve those issues at trial. See State v. Jones, 789 S.W.2d 545 (Tenn. 1990).

Petitioner may not establish cause by alleging the ineffectiveness of appellate counsel in failing to present certain issues on appeal because this claim has not been presented to the state courts. (See Footnote 7, and accompanying text).[13]

Finally, Petitioner may not establish cause by alleging that post-conviction counsel were ineffective in failing to raise certain issues to the state courts. There is no constitutional right to an attorney in state post-conviction proceedings, and therefore, a petitioner cannot claim constitutionally ineffective assistance of counsel regarding those proceedings. Coleman, 111 S.Ct. at 2566.[14]

Petitioner also argues that cause is established by the "widespread prosecutorial abuse and judicial bias" which tainted the trial and prevented post-conviction counsel from gaining "an adequate picture of the circumstances surrounding the crime and Petitioner's life." (Petitioner's Memorandum In Response To Respondent's Summary Judgment Motions And In Support Of An Evidentiary Hearing, at 50 (Docket No. 113)). Petitioner does not, however, specify how failure to raise a particular claim on direct appeal or during the post-conviction proceeding was impeded by the prosecution or the state court trial judge. Under these circumstances, the Court is not

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[13] In any event, the Court notes that a defendant does not have a constitutional right to have every nonfrivolous issue raised on appeal. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 3312-14, 77 L.Ed.2d 987 (1983).

[14] Furthermore, Petitioner has stated that he "is no longer pursuing the issue of ineffective assistance of post-conviction counsel." (Petitioner's Response To Motion To Compel Disclosure Of Documents From His State Court Attorneys' Files, at 2 (Docket No. 140)).

persuaded that an objective impediment prevented Petitioner from presenting claims to the state courts.

In conclusion, Petitioner has not demonstrated cause for his procedural default. Consequently, the Court need not determine whether prejudice resulted from the procedural default.

D. Actual Innocence

A petitioner who is unable to demonstrate cause and prejudice for a procedural default may nonetheless avoid a procedural default bar by demonstrating that he is actually innocent. Murray, 106 S.Ct. at 2649. In order to fall within the actual innocence exception to the procedural default bar, a petitioner must provide evidence that negates an element of the crime for which he was convicted, or demonstrates that he was not eligible for the death penalty under the applicable state law. Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 2521-22, 120 L.Ed.2d 269 (1992).

A petitioner who claims he is actually innocent of the crime for which he was convicted must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup, 115 S.Ct. at 867 (quoting Murray v. Carrier, 106 S.Ct. at 2649-2650). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. This standard requires "a stronger showing than that needed to establish prejudice." Id. (footnote omitted).

To be credible, this claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory

scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." Schlup, 115 S.Ct. at 865.

In order to establish actual innocence of the death penalty, a petitioner must provide "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" eligible for the death penalty under the applicable state law. Sawyer, 112 S.Ct. at 2517. In order to make this showing, the petitioner must focus on those elements which render a defendant eligible for the death penalty, e.g., aggravating circumstances, and not on additional mitigating evidence that was not introduced at sentencing. Sawyer, 112 S.Ct. at 2523.

Petitioner claims he is actually innocent of first degree premeditated murder based on (1) the testimony of a forensic pathologist regarding blood splattering at the scene of the stabbings; (2) the testimony of a psychiatric expert that Petitioner was insane at the time of the stabbings, and lacked the capacity to deliberate and premeditate; and (3) the lack of credibility of the testimony of the co-defendant, Harold Devalle Miller. Petitioner also claims he is actually innocent of felony murder because there was insufficient proof of the underlying felony -- theft.[15]

First, Petitioner argues that certain blood splattering evidence supports his claim of actual innocence. At the hearing in this Court, Petitioner presented the testimony of Dr. Kris Sperry, a

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[15] Although he mentions it in his brief, Petitioner does not appear to have asserted a freestanding actual innocence claim (that execution of one who is actually innocent violates the Eighth Amendment) in his Amended Petition. In any event, the standard for this claim is even higher than that set forth in Schlup. Therefore, the Court is not persuaded that Petitioner has established actual innocence as a separate claim. Schlup, 115 S.Ct. at 860-62; Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); Carriger v. Stewart, 132 F.3d 463, 476-77 (9th Cir. 1997).

forensic pathologist, who opined that the assailant would have had blood from the victims' wounds splattered on his body and his clothing. (Transcript of Hearing Beginning on February 6, 1998 ("Transcript"), at 37-38, 77). Petitioner points out, however, that crime lab reports indicate there were no blood stains found on clothes, a coat and two pair of work pants, seized from the Petitioner's apartment two days after the stabbings. (Lab Report, Petitioner's Exhibit 117; Search Warrant, Petitioner's Exhibit 115).

On the other hand, there is no evidence that during the stabbings, Petitioner was wearing the clothes later seized from his apartment. Norma Norman testified that Petitioner was wearing a black coat when he arrived at the apartment. (Addendum I, at 1342-1343). Because Petitioner taped her eyes before the stabbings were committed, however, she could not testify that he was wearing the coat during the stabbings. (Addendum I, at 1375-1378). There was no evidence that he was wearing one of the two pair of pants seized from his apartment two days after the stabbings, or that he had not disposed of the pants worn during the crime.[16]

Although this evidence may have provided a good argument for defense counsel to raise to the jury, the Court is not convinced that reasonable jurors probably would not have convicted Petitioner if they had been presented with this evidence.

Moreover, both Dr. Sperry and Petitioner conveniently overlook the fact that Petitioner admitted that he was guilty at the sentencing phase of the trial:

> ... But what I am saying is, I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. But I don't remember -- you know, I don't remember too much of why

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[16] Petitioner's failure to dispose of his coat may be explained by his fondness for the coat, which was given to him by his wife as a birthday gift. (Addendum I, at 1454-1455).

that all of a sudden came to me. All I know is that I'm the man that stabbed Mr. Daniel Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman.

(Addendum I, at 1865).

> The only thing that I can recollect is that, when I was over there on this young lady and realized that what I was doing -- I had stopped. The purpose to me, you know, I didn't want -- go over there to hurt nobody. But it was her that I seen underneath me that made me stop. And God spared her life. And after that I left.

(Addendum I, at 1866-67).

> Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting there, that that was true, didn't you?
>
> A. That I was the man, yes.

(Addendum I, at 1893. See also Addendum I, at 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

Next, Petitioner argues that the testimony of Dr. Robert Sadoff supports his claim of actual innocence. Dr. Sadoff opined that, at the time of the stabbings, Petitioner was insane because he lacked the substantial capacity to conform his conduct to the requirements of the law. (Transcript, at 523-524).[17] Dr. Sadoff testified that Petitioner was suffering from Post-Traumatic Stress Disorder, which is a mental illness. (Transcript, at 455, 457). Dr. Sadoff also diagnosed Petitioner as having a Borderline Personality Disorder, a mental disorder. (Id.)

The Court is not persuaded that Dr. Sadoff's testimony is sufficient to meet the Schlup actual innocence standard. First, Dr. Sadoff's diagnosis comes almost twelve years after the

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[17] This was the applicable standard for establishing an insanity defense under Tennessee law at the time of Petitioner's trial. See, e.g., State v. Clayton, 656 S.W.2d 344, 346 (Tenn. 1983).

crime, and Dr. Sadoff admitted that the passage of time made it more difficult for him to render a diagnosis. (Transcript, at 584-585). On the other hand, a mental evaluation of the Petitioner conducted shortly after the stabbings found that Petitioner was competent to stand trial, and that an insanity defense could not be supported. (Petitioner's Exhibit 150). The evaluation was performed by the staff of MTMHI after observing the Petitioner over a thirty-day period in residence. (Id.) Dr. Craddock, who was a member of the MTMHI team that evaluated Petitioner, testified at the hearing in this case. (Transcript, at 83-163). Although the MTMHI staff did not possess all the Petitioner's previous institutional records at the time they made their diagnosis, that diagnosis should not be given less weight than one made twelve years later.

In addition, Dr. Sadoff's opinion is based primarily on Petitioner's claim that he could not remember the stabbings. (Transcript, at 569). Consequently, Dr. Sadoff opined that Petitioner was probably "dissociating" at the time of the stabbings. (Transcript, at 517-518). As a result, according to Dr. Sadoff, if Petitioner was dissociating, he lacked substantial capacity to conform his conduct to the requirements of the law, or to engage in premeditation and deliberation. (Transcript, at 523-524, 564).

But Petitioner has not always professed an inability to recall the stabbings. The MTMHI records indicate that Petitioner stated he "remembers everything that happened" at the time of the stabbings. (MTMHI Staff Conference Report dated February 19, 1987, Petitioner's Exhibit 150; Transcript, at 97). Nor has Petitioner adhered to the same story. Shortly after his arrest, Petitioner claimed that a third party, Sam Blackstock, was involved in the stabbings. (Transcript, at 210-212). That story turned out to be false. (Id.) Finally, although Petitioner insists that the Court should not rely on Petitioner's testimony during the sentencing hearing, Petitioner clearly

admitted his guilt at that time. (Addendum I, at 1865-1867; 1893-1894; 1957; 1961; and 1968). Because Dr. Sadoff's opinion strongly relies on the questionable, self-serving statements of the Petitioner, the Court does not attach a great deal of weight to that opinion.[18]

Petitioner also argues that he is actually innocent because the testimony of co-defendant Miller, which indicated that Petitioner committed the stabbings pursuant to a preconceived plan, is not credible. But this argument is not supported by any "new" evidence, as contemplated by Schlup, 115 S.Ct. at 865. See also McCoy v. Norris, 125 F.3d 1186, 1190-91 (8th Cir. 1997). Furthermore, the Court is not persuaded that pointing out every inconsistency in Miller's testimony would have led the jury to change its verdict. See Sawyer, 112 S.Ct. at 2524 (evidence "brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness'] account of petitioner's actions"). In other words, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Miller's credibility problems.

Petitioner also fails to present new evidence regarding the robbery. Instead, Petitioner argues that none of the witnesses saw the Petitioner take $300 from the apartment, and that it was

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[18] These would include the statements made by the Petitioner while under hypnosis. Dr. Sadoff admitted that there is no way to determine whether the statements made by the Petitioner while under hypnosis are objective fact. (Transcript, at 504-505, 507, 508, 572, 575). The Court notes that Petitioner did not testify at the hearing to memories purportedly recalled during hypnosis.

During the hearing, the Court held that the hypnosis tape offered by the Petitioner was admissible for the limited purpose of establishing what Dr. Sadoff relied upon in forming his opinion. (Transcript, at 505-516). The Court also determined that the hypnosis tape did not satisfy the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and declined to admit the statements made on the tape for the truth of the events leading up to and include the stabbings. (Id.).

just as plausible, based on the evidence, that someone else had taken the money. As the Court has determined in a previous Order (Docket Nos. 156, 157), although the evidence was circumstantial, it was still sufficient to allow the jury to find the elements of robbery beyond a reasonable doubt. Consequently, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Petitioner's arguments regarding the lack of sufficient evidence.

Petitioner also argues that this new evidence also shows he is actually innocent not only of the crime, but also of the death penalty. As discussed above, the Schlup Court has pointed out that the standard for establishing actual innocence of the death penalty, set forth in Sawyer, is stricter than that required to show actual innocence of the capital crime. The stricter standard requires Petitioner to provide clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. For the reasons explained above, the Court concludes that Petitioner has not shown actual innocence of the death penalty.

Because Petitioner has not established cause and prejudice, or actual innocence, he may not avoid the procedural default of the claims to which Respondent has asserted a procedural default defense. Accordingly, the Court will only address the following claims: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1), (7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶ A, E1-E2(g)).

V. The Trial Court's Instructions Regarding the "Heinous, Atrocious or Cruel" Aggravating Circumstance and Unanimity

Prior to the hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(1), (4), C8) were unconstitutional. (Docket Nos. 123, 124). For the reasons stated in that opinion, those claims are without merit, and are dismissed.

VI. Brady Violations

As noted above, two of Petitioner's Brady[19] claims have been exhausted and are properly before this Court. Petitioner claims that the prosecution should have provided trial counsel with the transcript of his trial in 1972 for murder because, he contends, it would have supported an insanity or mental illness defense. (Amended Petition, ¶¶ D1 (1)). Petitioner also claims that the prosecution should have provided the crime lab analysis indicating that no blood was found on the clothes seized from Petitioner's apartment. (Amended Petition, ¶¶ D1 (7)).

In a series of cases beginning with Brady v. Maryland, 83 S.Ct. at 1196-97, the Supreme Court has held that the prosecution must disclose exculpatory evidence to the defense, with or without request. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Suppression of this evidence violates due process if the evidence is material either to guilt or to punishment, regardless of the good faith of the prosecutor. Id.

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[19] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Withheld evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 105 S.Ct. at 3383. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. 105 S.Ct. at 3384. A showing of materiality does not require the defendant to show that the suppressed evidence would have resulted in the defendant's acquittal. 105 S.Ct. at 3383-84. Materiality is concerned with whether suppression of the evidence undermines confidence in the outcome of the trial. 105 S.Ct. at 3381.

The Supreme Court recently reaffirmed this standard for determining materiality in Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 1567-68, 131 L.Ed.2d 490 (1995). The Court pointed out that "materiality" is not a sufficiency of the evidence test, which would require a defendant to show insufficient evidence to convict after discounting the inculpatory evidence in light of the undisclosed evidence. 115 S.Ct. at 1566. Rather, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. (footnote omitted).

The Court explained that in considering materiality, a reviewing court is to assess the collective effect of the suppressed evidence in light of the evidence presented at trial. 115 S.Ct. at 1567. Finally, the Court pointed out that, once constitutional error is found under this standard, there is no need for further harmless-error review because the error cannot be found harmless. 115 S.Ct. at 1566-67.

On appeal of the denial of Petitioner's state post-conviction petition, the Tennessee Court of Criminal Appeals considered this issue as follows:

> Appellant next contends that his conviction and sentence were the result of prosecutorial misconduct because the state failed to provide him with exculpatory material as required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a violation of Brady, appellant must prove (1) the prosecutor suppressed evidence, (2) that the suppressed evidence would have been favorable to the defendant and (3) the materiality of the suppressed evidence.
>
> The evidence claimed to have been suppressed consisted of the transcript of the defendant's 1972 federal murder trial, lab reports on clothing seized from appellant's apartment, a police report about appellant's violent behavior at the time of his arrest, statements by his accomplice, Harold Devalle Miller, a police report suggesting that property belonged to one victim rather than the other, and information relative to the appellant's bank account. None of the above evidence was favorable to the defense. We find no merit to the appellant's claim of prosecutorial misconduct.

Jones v. State, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995).

Whether a Brady due process rights violation has occurred presents a mixed question of law and fact which is reviewed de novo. Brown v. Cain, 104 F.3d 744, 750 (5th Cir. 1977); Reese v. Delo, 94 F.3d 1177, 1183 (8th Cir. 1996); Hays v. Alabama, 85 F.3d 1492, 1498 (11th Cir. 1996).

In 1972, Petitioner was tried in a Virginia federal court for the murder of a fellow prisoner, Michael Stein. (Petitioner's Exhibit 131). He was convicted of second degree murder. (Exhibit 105). At that trial, a psychiatrist, Dr. Asot M. Masri, opined that Petitioner had been in a "homosexual panic" when he stabbed Stein.[20] (Petitioner's Exhibit 131, at 48). He testified that the Petitioner had a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). The Government called another psychiatrist, Dr. Robert Eardley, who

[20] Dr. Masri characterized homosexuality as a mental disease. (Petitioner's Exhibit 131, at 51).

opined that Petitioner was not suffering from a mental disease when he stabbed Stein. (Petitioner's Exhibit 131, at 57-58, 59, 66).

Petitioner argues that this evidence was exculpatory because the State argued at trial that Petitioner did not suffer from any emotional disturbance.

There is no dispute that the prosecutor had this transcript in his possession at some point before trial began. There is also no dispute that he did not provide the transcript to the defense.[21] Respondent contends that the state court was correct in concluding that the transcript was not favorable to the defense because neither psychiatrist opined that the Petitioner was insane.

The Court believes this information was favorable to the Petitioner because the Petitioner had stated his intention to rely on a mental illness defense at trial and sentencing (Transcript, at 959-60, 963), and Dr. Masri's testimony supported that defense. The Court is not persuaded,

[21] During the hearing, the prosecutor explained his reasoning:

> Based on all the testimony, I concluded for two reasons, one the lapse of time or I guess you might say the distance in time between the two events and what I call very weak testimony from the defense psychiatrist at the trial, that it was not exculpatory, would have no bearing on explaining whether at the time of this crime he had a mental illness or suffered from any kind of emotional snapping, because the situation in the federal prison was one where even taken in light most favorable to the defendant was triggered as a result of a sexual assault on him.
>
> That wasn't the case here where the defendant sought out the victim and went to the victim and pursued the victim.

(Transcript, at 1015-16).

As for mitigation, the prosecutor testified that his interpretation of the psychological testimony was that during the previous killing, the Petitioner "got angry and snapped." (Transcript, at 1016). There was no evidence, according to the prosecutor, that there were any external circumstances operating on the Petitioner during the 1986 crime. (Id.)

however, that the prosecution's failure to provide the transcript to defense counsel rises to the level of a due process violation because Dr. Masri's testimony was not "material."

In a later section of this Memorandum, the Court concludes that Petitioner received ineffective assistance of counsel because his trial counsel failed to investigate his mental health history, background and other areas of mitigation. The Court is not persuaded, however, that "the proceeding would have been different" if the prosecution had disclosed Dr. Masri's testimony to Petitioner's trial counsel. Petitioner's trial counsel already had various clues that should have led them to investigate Petitioner's mental health history, such as the records of Petitioner's evaluation at MTMHI before trial, and conversations with Petitioner's wife. There is no reason that Dr. Masri's testimony should have been the key element prompting Petitioner's counsel to take action.

Similarly, admission of this testimony as an item of evidence during the guilt phase of the trial would not have affected the result. Had Petitioner's defense counsel hired an expert to opine that Petitioner was insane at the time of the stabbings in 1986, Dr. Masri's testimony about an incident in 1972 could have supported that opinion, but it certainly would not have been vital. Absent an insanity defense, there would be no reason to admit this evidence relating to a prior crime during the guilt phase of the trial.

As for the sentencing phase, Dr. Masri's testimony would have served as an item of mitigation relating both to the prior murder conviction, and to his mental history. But that testimony is only one item of evidence that, as the Court explains below, should have been introduced by trial counsel during the sentencing hearing as mitigation evidence. Standing alone,

the Court is not persuaded that the absence of Dr. Masri's testimony undermines confidence in the outcome of the sentencing hearing.

As for the lab reports finding that no blood was found on clothing seized from Petitioner's apartment, there has been no evidence that the prosecutor kept this evidence from the defense. The prosecutor testified that he provided the lab reports to Petitioner's first trial counsel, Neal McAlpin, and Mr. McAlpin testified that he received them. (Transcript, at 223-25, 227, 925). Furthermore, the prosecutor testified that he filed the reports with the trial court as part of his response to the Petitioner's discovery request. (Transcript, at 911, 926; Supplemental Response Number Two To Defendant's Request For Discovery, Exhibit 19). Under these circumstances, the Court concludes Petitioner's Brady claim regarding these lab reports is without merit.

Accordingly, the Court concludes that Petitioner's Brady claims are without merit, and are dismissed.

VII. Trial Counsel's Conflict of Interest

Petitioner claims that one of his trial attorneys, Lionel Barrett, had an irreconcilable conflict of interest in representing Petitioner because he was paid a $5,000 retainer by Southeastern Gospel Ministry ("SEGM") member Alan Boyd to represent the Petitioner, and was promised an additional $10,000 that was never paid (Amended Petition, at ¶ E1).[22] Sometime after his arrival in Nashville, Petitioner joined SEGM, a nascent religious group that had as its goal "cleaning up" the African-American community by eliminating illegal activities, primarily

[22] $5,000 was inadequate to investigate and prepare this complex case for trial.

drug dealing. (Addendum 11, at 15-16). Petitioner's boss, Alan Boyd, co-defendant Miller, and William Beard were also members of the group. (Id.). Petitioner and co-defendant Miller both worked for Mr. Boyd at National Baptist Publishing.

Petitioner contends that Mr. Boyd had interests adverse to the Petitioner because Mr. Boyd and SEGM allegedly knew about and took part in the plan to visit the apartment of Patrick Daniels before the stabbings, and met with the Petitioner and co-defendant Miller after the stabbings. According to the Petitioner, Mr. Boyd retained Mr. Barrett and refused to pay him the full retainer with the effect of preventing Mr. Barrett from investigating the role of SEGM and Mr. Boyd in the crime.

In order to establish a Sixth Amendment violation, the Petitioner must show that an actual conflict of interest affected his lawyer's performance. Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987); United States v. Mays, 77 F.3d 906, 908 (6th Cir. 1996).[23] Whether facts give rise to a conflict of interest is a mixed question of fact and law, which is to be reviewed de novo. Mays, 77 F.3d at 908.

In reviewing the denial of Petitioner's post-conviction petition, the Tennessee Court of Criminal Appeals found that Mr. Barrett did not know the funds he received came from SEGM member Alan Boyd. Jones v. State, 1995 WL 75427, at * 3 (Tenn. Crim. App. Feb. 23, 1995). Petitioner argues that this finding is not fairly supported by the record because Gail Hughes

[23] To the extent Petitioner argues that he is not required to show that the conflict "affected his lawyer's performance," this argument has been soundly rejected. See, e.g., Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984); Wilson v. Rogers, 125 F.3d 856 (Table), 1997 WL 615767 (6th Cir. Oct. 3, 1997).

Mann, who delivered the money to Mr. Barrett, testified at the post-conviction hearing that she told Mr. Barrett that the money came from Mr. Boyd. (Addendum 11, at 13).

Both Mr. Barrett and Ms. Mann testified in a hearing before this Court. Mr. Barrett was quite certain he was not aware the funds came from Mr. Boyd. (Transcript, at 294, 410). Ms. Mann, on the other hand, was more tentative:

> Q. Did you tell him where the money came from?
> A. I don't remember that. I don't know if I told him or not . I probably did. I don't know.
> Q. In the post-conviction proceeding you testified you did tell Mr. Barrett?
> A. Probably so.
> Q. Can you testify to that today?
> A. That I told him?
> Q. Yes.
> A. I don't remember. I don't know. I might have told him. If I say I told him back then, I did then tell him.

(Transcript, at 1281). In her subsequent testimony, Ms. Mann was a bit more definite that she had told Mr. Barrett the source of her funds, Mr. Boyd, would not be providing any more funds. (Transcript, at 1288).

Based on the testimony of Mr. Barrett and Ms. Mann, the Court concludes that Mr. Barrett was not aware that Mr. Boyd was the source of the fee, even if Ms. Mann happened to mention it in a conversation with him. Even if Mr. Barrett was aware of the source of the fee, the Court is not persuaded that it affected his representation.

Petitioner argues that the conflict of interest led Mr. Barrett to fail to request attorneys' fees and funds for expert support services. Petitioner also argues this conflict led Mr. Barrett to delay representation and to refuse to ask for a continuance.

In order to accept Petitioner's argument, the Court must find that the source of Mr. Barrett's fees had interests contrary to Petitioner's interest. But, as noted above, the Petitioner himself testified at sentencing that SEGM did not order him to commit the crimes for which he was convicted.

Moreover, even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing. Mr. Barrett elicited testimony about another SEGM member, William Beard, during cross-examination of Mr. Miller at the trial. (Addendum 1, at 1527, 1567). He also elicited testimony about SEGM from the Petitioner at the sentencing hearing, including testimony that Mr. Boyd supplied him with a shotgun, and William Beard supplied Mr. Miller with a pistol. (Addendum 1, at 1837-1848, 1855-1856).[24] Mr. Barrett also mentioned the Petitioner's connection with the group during his argument. (Addendum 1, at 1960). In addition, Mr. Barrett issued subpoenas for Mr. Boyd and Mr. Beard to appear at the trial. (Transcript, at 358).

During the evidentiary hearing in this Court, in response to a question by the Court, Mr. Barrett stated:

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[24] According to co-defendant Devalle Miller's testimony at the post-conviction proceeding, Alan Boyd met with Petitioner and Miller right after the murder of Patrick Daniels, and William Beard helped Miller leave town shortly thereafter. (Addendum 11 at 26-30). Mr. Boyd purchased the shotgun carried by Petitioner during the murder from a gun dealer in 1983, according to a firearms trace report. (Docket No. 200).

Alan Boyd and William Beard both asserted their Fifth Amendment privilege against self-incrimination at depositions taken in this case. Boyd and Beard effectively refused to answer any questions. (Petitioner's Exhibits 148, 149).

> Your Honor, I am as certain as a person can be from something that happened 10 years ago that I absolutely had no knowledge that these funds came from Mr. Boyd.
>
> For the sake of argument only -- even if I had been told these funds came from Allen Boyd, I would have had absolutely no hesitancy in going after him in any way I could and would think he had wasted his money if that is what he was attempting to do.
>
> I am absolutely certain that there was no decision, no single issue of strategy, not one question that Mr. Camp or I asked or did not ask had anything to do with the source of the funds that came from Ms. Hughes or from Allen Boyd.

(Transcript, at 410).

The Court is not persuaded that any alleged conflict of interest affected the performance of Mr. Barrett at trial or sentencing. Accordingly, Petitioner's conflict of interest claim is without merit, and is dismissed.

VIII. Ineffective Assistance of Counsel

A. Generally

Petitioner contends that trial counsel was ineffective during the guilt phase and during the sentencing phase of his trial (Amended Petition, at ¶ E2). In order to prevail on an ineffective assistance of counsel claim, the burden is on the Petitioner to show: (1) trial counsel's performance was deficient; and (2) actual prejudice resulted from the deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064-68, 80 L.Ed.2d 674 (1984); O'Hara v. Wigginton, 24 F.3d 823, 828 (6th Cir. 1994).

In order to demonstrate that trial counsel's performance was deficient, a petitioner must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 104 S.Ct. at 2064. The petitioner must

show that trial counsel's performance, fell below an objective standard of reasonableness, measured by "prevailing professional norms." Id.

In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 104 S.Ct. at 2065. The petitioner must overcome the presumption that the challenged action by counsel was sound trial strategy. Id.

One of the duties of counsel is the duty to investigate his client's case. 104 S.Ct. at 2066. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id.

In order to show actual prejudice, a petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id.

Thus, when a petitioner challenges his conviction on ineffective assistance of counsel grounds, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt about guilt. 104 S.Ct. at 2068-69. When the petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." 104 S.Ct. at 2069. In assessing prejudice, the court is to assume that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 104 S.Ct. at 2068.

The ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo. 104 S.Ct. at 2070; McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996).

Petitioner's contention that his trial counsel, Lionel Barrett and Sumter Camp, were ineffective was first raised on direct appeal by Petitioner's substitute counsel, Richard Dinkins. Petitioner argued that trial counsel should have presented evidence of Petitioner's mental incapacity at sentencing. (Addendum 2, at 57-59). In addressing this claim, the Tennessee Supreme Court stated: "There is no evidence in this record or any other part of [the Petitioner's] extensive criminal record to indicate he was either incompetent to stand trial or at the time this offense was committed. There is nothing in this record to indicate a remand for a determination of defendant's mental status would be appropriate." State v. Jones, 789 S.W.2d at 552.

Petitioner raised this issue again in his post-conviction petition. Petitioner based his contention that counsel was ineffective on over twenty separate grounds. (First Amended Petition For Post Conviction Relief, Addendum 11). At the post-conviction hearing, Petitioner's counsel called Petitioner's initial attorney, Neal McAlpin; trial counsel, Lionel Barrett and Sumter Camp; and appellate counsel, Richard Dinkins. (Addendum 11). Petitioner also called Gail Hughes Mann; Petitioner's co-defendant, Harold Devalle Miller; Petitioner's wife, Susi Bynum Jones; and a psychiatrist, Dr. Barry Nurcombe. (Id.)

The post-conviction trial court found that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental health history. (Memorandum and Order entered August 26, 1993, Addendum 11). Specifically, the post-conviction court found that trial counsel failed to investigate as follows:

1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.

2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.

3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at DuPont Jr. High School at Ft. Lewis, Washington.

4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.

5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.

6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.

7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.

8. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.

9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI per their request.

10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.

11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.

12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.

13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

(Memorandum and Order entered August 26, 1993, at 5-6, Addendum 11) (footnote omitted) (emphasis in original).

The court concluded, however, that the failure to investigate did not prejudice the Petitioner because his background also contained harmful information. (Id.)

The Tennessee Court of Criminal Appeals agreed with the trial court's decision:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial.

Jones v. State, 1995 WL 75427, at *2.

During the evidentiary hearing in this Court, Petitioner called all the witnesses who testified at the post-conviction proceeding except Dr. Nurcombe and Mr. Miller. In addition, Petitioner presented, for the first time, the live testimony of Petitioner's half-sister, Nancy Lancaster; Petitioner's former fiancé, Sarah Roberts Walton; co-defendant Miller's former attorney, Ross Alderman; mental health experts, Dr. Sadoff, and Dr. Nancy McCoy; Dr. Ray Winbush; and legal expert Brian Stephenson. Petitioner also presented, for the first time, the testimony of Detective Mark Garafola, Elmer H. Bishop, William Delagrange, and Richard Bretzlauf by deposition. (Petitioner's Exhibits 110, 135, 136, 152).

During their testimony before this Court, Mr. Barrett and Mr. Camp admitted most of the deficiencies alleged by the Petitioner. Mr. Barrett was first requested to represent the Petitioner in October, 1996. (Transcript, at 326). During the next month, Petitioner's initial counsel, Neal McAlpin, began to withdraw from representation. (Transcript, at 233-234). Mr. Barrett did not begin actually working on the case, however, until March, 1987. (Transcript, at 336-337). On April 20, 1987, Mr. Barrett first requested the help of Mr. Camp, who was an associate with Mr. Barrett's firm at that time. (Transcript, at 271-272, 342, 691). Mr. Camp first began work on the file sometime after May 11, 1987. (Transcript, at 691-692). Mr. Barrett took the lead in the case, and Mr. Camp's role was to assist him. (Transcript, at 695, 723). Trial was set for July 6, 1987. (Transcript, at 338).

Trial counsel had three to four months to prepare for trial. The investigation they conducted during this time was wholly inadequate. Mr. Barrett admits that he did not obtain Mr. McAlpin's file in the case, or discuss the case in any kind of depth with Mr. McAlpin, even though Mr. McAlpin suggested that he do so. (Transcript, at 240-242, 277, 279, 722). Because of that failure, and the subsequent failure to inspect the court file, Petitioner's trial counsel were not aware of the lab reports indicating that no blood was found on clothes seized from Petitioner's apartment. (Transcript, at 277, 292, 322, 341, 331-333). Counsel also failed to respond to a request, sent to Mr. McAlpin, from MTMHI staff for background information to be used in their psychiatric evaluation of the Petitioner. (Transcript, at 242-243, 331-333).

Mr. Barrett failed to request Petitioner's extensive mental health records, or his educational, prison, or military records. (Transcript, at 280-281). This was a serious failure.

Although Mr. Barrett prepared a motion requesting that the trial court declare his client indigent, and approve funds for investigative and expert services, he did not file the motion. This was a significant error. (Transcript, at 278, 363-367, 701).[25] Mr. Barrett did not consult or hire a mental health expert to perform an independent mental evaluation of his client. (Transcript, at 278, 718-719). This was a grave omission.

Mr. Barrett did not introduce any information from the MTMHI records relating to Petitioner's background or mental history at the trial or at sentencing. (Transcript, 725). Trial counsel received the MTMHI records only a couple of weeks prior to the trial, and neither recall speaking with any of the MTMHI staff about their report. (Transcript, at 280, 282, 352, 716-717). These were substantial errors.

Petitioner's attorneys did not call anyone in Petitioner's family to testify during the sentencing hearing. Mr. Barrett testified that someone in his office contacted Petitioner's brother, Mark Jones, before trial, but he refused to assist in Petitioner's defense. (Transcript, at 286-289). Mr. Camp testified that he did not contact the Petitioner's brother. (Transcript, at 710). At the post-conviction hearing, Petitioner introduced an affidavit from Mark Jones[26] indicating that he had not been contacted by Mr. Barrett's office. (Petitioner's Exhibit 74; PC Exhibit 67). It is undisputed that Petitioner's attorneys did not contact Petitioner's half-sister, Nancy Lancaster, even though she would have been available and willing to testify at the time of

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[25] The Motion was prepared three days after jury selection began. (Transcript, at 727). A post-trial motion for indigent status was approved. (Transcript, at 376; Petitioner's Exhibit 88).

[26] Mark Jones committed suicide on July 13, 1996. (Transcript, at 793).

trial. (Transcript, at 832). Mr. Barrett did not contact Petitioner's former fiancé, Sarah Roberts Walton, even though the Petitioner told Mr. Barrett about her. (Transcript, at 356). These were significant mistakes.

Finally, Mr. Barrett failed to investigate the nature of Petitioner's prior convictions.[27] (Transcript, at 281, 708-709, 714-715). This was a substantial error.

As the trial date approached, Mr. Camp suggested that they request a continuance to conduct further investigation, but Mr. Barrett did not act on that suggestion. (Transcript, at 279, 705). This was a serious deficiency.

Although both these attorneys have good reputations in the bar, their performance in this case was clearly inadequate. Mr. Barrett critiqued his own performance as follows:

> I think as the trial progressed and on looking back on it now, I think that I should have sought out further psychiatric evaluation. I think it became evident during the course of the trial that Mr. Jones -- and in Mr. Camp's opinion and my opinion had some psychiatric or psychological issues we may not have fully realized early on in the case. . . Based upon the documents that I have now seen subsequent to the trial, I feel that my performance certainly did not satisfy the standards that I adhere to myself as far as pursuing the psychiatric aspect, particularly at the sentencing hearing.

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[27] Mr. Barrett testified that the prosecutor introduced him to FBI Agent William Delagrange at trial, and that the agent said he would testify that Petitioner's 1972 conviction was the result of a "drug turf war," and not a homosexually-related killing, as Petitioner contended. (Transcript, at 294-299). Given his failure to investigate Petitioner's prior convictions, Mr. Barrett did not have any independent information about the conviction, and therefore, did not introduce mitigating evidence about this conviction at the sentencing hearing. (Transcript, at 299). As discussed herein, the 1972 conviction was not over drugs and gangs as represented by the prosecution to defense counsel. The murder concerned homosexual conduct that the jury could have found more mitigating.

(Transcript, at 394-395).[28]

Mr. Camp's assessment was even more negative. He testified that he agreed with the state courts that his representation was deficient:

> We did not present the information to this jury so that they would know James Jones, so that in deciding whether he was to live or die they would know this man, they would know this human being. That was our failure.
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> . . . [W]e didn't give the jury any reason to oppose death on James Jones. We didn't explain to them how James Jones came to be in that courtroom facing them.

(Transcript, at 734, 741, 766).

Thus, this Court, like the state post-conviction trial court and appeals court, finds that trial counsel's performance during the guilt phase and during sentencing was deficient. Unlike those courts, however, this Court concludes that Petitioner suffered prejudice as a result of that deficiency during the sentencing phase of this trial.

Before addressing prejudice at sentencing, the Court will consider whether trial counsel's deficiencies prejudiced Petitioner as to the guilt phase of the trial. Petitioner argues he was

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[28] Shortly after the trial, defense counsel realized the need to fully consider Petitioner's mental state. Mr. Barrett wrote Mr. Camp the following memorandum on August 26, 1987:

> You will get a copy of communication from James Lee Jones saying that he thinks he is going to get the Nobel Peace Prize. I think he is probably crazy. I think that we should move to have him psychiatrically evaluated prior to the sentencing hearing in view of the United States Supreme Court decision that you cannot execute a person that is crazy. I also think that in the sentencing provision in the code there is some indication that a person can be psychatrically [sic] evaluated. We need to get this done as soon as possible and I would appreciate it if you could prepare the paperwork.

(Petitioner's Exhibit 85).

prejudiced because trial counsel did not introduce the lab report indicating that no blood was found on clothes seized from Petitioner's apartment, and because trial counsel failed to obtain an expert to support an insanity defense.

The Court is not persuaded that if trial counsel had presented the lab report to the jury, they would have had a reasonable doubt about guilt. As discussed above, there is no evidence that Petitioner was wearing the clothes seized from his apartment during the stabbings.[29]

Similarly, the Court is not persuaded that trial counsel's presentation of a mental health expert to testify on behalf of the Petitioner would have left the jury with a reasonable doubt about Petitioner's guilt. It is not clear that trial counsel would have found an expert to testify that Petitioner was insane at the time of the stabbings. As noted above, Dr. Sadoff's opinion that Petitioner was insane at the time of the offense comes some twelve years after the crime. Furthermore, any testimony to this effect would have been countered by the prosecution with MTMHI's opinion that there was no basis for Petitioner to invoke an insanity defense. Thus, the Court concludes that Petitioner suffered no prejudice at the guilt stage as a result of trial counsels' deficiencies.

As for sentencing, however, the Court concludes that there is more than a reasonable probability that, had trial counsel introduced the mitigation evidence they would have had available after a reasonable investigation, the result of the sentencing would have been different.

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[29] Petitioner also ignores the fact that he admitted his guilt at sentencing. (Addendum I, at 1865, lines 5-12; 1866, line 25 through 1867, line 6; 1893, lines 4-8; 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

The Court is of the opinion that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome of the sentencing.

In evaluating the prejudice at sentencing, it is important to keep in mind the nature of mitigation evidence during the sentencing proceeding. In the "eligibility" phase of the sentencing proceeding, the jury narrows the class of defendants "eligible" for the death penalty, generally by determining whether certain well-defined aggravating circumstances are applicable to the case. Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, 761, ___ L.Ed.2d ___ (1998); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980). During the "selection" phase, the jury determines whether to impose the death penalty on a particular defendant. Buchanan, 118 S.Ct. at 761. In regard to making this "selection" decision, the Supreme Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." Id. Indeed, the Court has consistently held that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Id.

Mitigating evidence relevant to the selection decision includes "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 2946, 106 L.Ed.2d 256 (1989). As the Supreme Court has explained: "If a sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who

have no such excuse.'" 109 S.Ct. at 2947 (quoting California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)). The sentencing decision should reflect "a reasoned moral response to the defendant's background, character, and crime." Id.

Thus, there is a broad array of evidence that is considered to be relevant to mitigation. In addition, the rules of evidence do not apply to the presentation of that evidence. During the relevant time period, Tennessee Code Annotated Section 39-2-203 (c) provided:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(Exhibit 155).[30] Consequently, Petitioner's counsel were not constrained by evidentiary restrictions in introducing mitigation evidence at sentencing.

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[30] Thus, this Court has used a similar standard in determining whether prejudice has been established in light of the evidence that could have been admitted at the sentencing hearing. In that regard, the Court notes that Rule 7 of the Rules Governing Section 2254 Cases provides that the habeas corpus record may be expanded "by the inclusion of additional materials relevant to the determination of the merits of the petition." Habeas Corpus Rule 7(a). The Rule indicates that copies of letters, documents, exhibits, and affidavits may be included in the expanded record. Habeas Corpus Rule 7(b). The court "may require" the authentication of material added to the record under the Rule. Habeas Corpus Rule 7(d). Thus, Rule 7 contemplates a relaxed application of the hearsay, best evidence, authentication, and other evidentiary rules under the Federal Rules of Evidence. Liebman, Federal Habeas Corpus Practice and Procedure, § 19.5, at 532 (2d ed. 1994).

In this case, there was an abundance of mitigation evidence available that was never used at trial. For example, trial counsels' reasonable investigation would have produced information about Petitioner's childhood abuse by his father, a military policeman. Trial counsel could have introduced evidence about this abuse through descriptions contained in some of Petitioner's mental health records, through the testimony of Petitioner's step-sister, Petitioner's wife, Petitioner's now-deceased brother, and Petitioner's former fiancé.[31]

During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. (Transcript, at 786, 818, 822-823, 832, 838-839). Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. (Transcript, at 786-787). Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. (Transcript at 787).[32] Petitioner's mother later married Petitioner's father, James Jones, Sr.

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[31] The affidavit of Mark Jones, Petitioner's deceased brother, which was introduced at the post-conviction hearing, confirms Petitioner's statements about the abuse and other difficulties he encountered during his childhood. (Mark Jones Affidavit, ¶ 5, Petitioner's Exhibit 74). Sarah Roberts Walton and Susi Bynum testified in this Court about Petitioner's previous statements to them that he had suffered abuse as a child. (Transcript, at 1191-1192; February 19, 1987 – MTMHI Social History, Petitioner's Collective Exhibit 150).

[32] As a result, Ms. Lancaster was unable to testify as to her age or birthday. (Transcript at 787). The taxi driver went back to the woods, retrieved the children, and turned them over to the state. Id.

(Transcript, at 793-794). Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.

Petitioner's statements to mental health providers provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. (Transcript, at 629-634; Petitioner's Collective Exhibit 150; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9). Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. (Transcript, at 475, 631, 818; Petitioner's Collective Exhibit 150). Petitioner's father struck Petitioner's penis with a baseball bat. (Transcript, at 475, 632). To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. (Transcript, at 634). None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury. This was a grave omission by defense counsel.

This, of course, is not to suggest that people who are abused as children should get away with murder. People with bad childhoods can be sentenced to death. But, the Constitution requires that these significant facts should have been presented to the jury at sentencing by counsel.

Petitioner's school and mental health records indicate that Petitioner's family lived in several different locations, and that Petitioner had undergone mental evaluations several times during his childhood. Petitioner ran away from home several times, and eventually, at 15, left home for good. (Mark Jones Affidavit at ¶ 4, Petitioner's Collective Exhibit 74; Transcript, at 630).

A reasonable investigation would have produced information about Petitioner's mental history. A review of the MTMHI records, which trial counsel had in their possession before trial, would have indicated that Petitioner had had prior mental evaluations, that he had served in the army, and had spent several years in prison. (Petitioner's Collective Exhibit 150). Petitioner's school, military and prison records reveal that Petitioner had been diagnosed in 1964 as having "paranoid personality" (December 11, 1964 -- Western State Hospital, Tacoma, Washington, Respondent's Collective Exhibit 8) and, in 1971, as having a "passive aggressive personality, aggressive type." (May 11, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142). These records also describe the Petitioner as: "very sick" and in need of immediate commitment (November 12, 1964 -- Richard Stiles of Dupont Junior High School, Respondent's Collective Exhibit 8), "in serious need of therapy" (May 24, 1965 -- Sayre Junior High School Staff, Respondent's Collective Exhibit 7); and "highly disturbed." (December 30, 1970 -- FR, Petersburg, Petitioner's Collective Exhibit 142; Respondent's Collective Exhibit 6, Tab 8). The records also reflect numerous suicide attempts (February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9; April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; March 19, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142; June, 1972 -- FCI, Tallahassee, Addendum 11, PC Exhibit). None of this evidence was offered to the jury. This was significant error by counsel.

Petitioner also had a family history of serious mental conditions. Petitioner's sister, Sylvia, attempted suicide on multiple occasions and was institutionalized several times for mental health problems. (Transcript at 803, 815, 626). Petitioner's brother, Mark, committed

suicide while this case was pending in this Court.[33] To call the Jones family dysfunctional would be an understatement. (Transcript at 626).

Had counsel conducted an in-depth interview before calling Susi Bynum to testify at sentencing, they would have gathered more evidence regarding Petitioner's mental health. They would have learned about Petitioner's belief that he and his wife would have the next Messiah; Petitioner's having carried on conversations with nonexistent people and animals; and his having banged his head against the wall on various occasions. (Transcript, at 1224, 1225, 1229, 1216).[34] Again, none of this evidence was made known to the jury. Ms. Bynum testified that she even told Mr. Barrett that he should have a psychiatrist examine the Petitioner before the trial. (Transcript, at 1250). These were serious deficiencies by defense counsel.

Had trial counsel heeded Ms. Bynum's suggestion and hired a mental health professional to evaluate the Petitioner, or had they interviewed MTMHI's Dr. Craddock, they could have presented evidence that Petitioner had, at the very least, exhibited symptoms of a Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior. (Transcript, at 129-132; 140). A mental health professional, like Dr. McCoy, could have offered testimony about Petitioner's background and mental history, and could have offered an explanation placing in context the negative aspects of Petitioner's past.

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[33] Sylvia Jones, as a teenager, had a child out of wedlock by her own father according to Ms. Lancaster's uncorroborated view of the family's history. (Transcript at 793-795). The whereabouts of Sylvia Jones is unknown. Mark Jones committed suicide on July 13, 1996. (Transcript at 793). The suicide was within days of his arrest for sexually and physically abusing his children. (Transcript at 627).

[34] The Court notes that the MTMHI files also revealed much of this same information. (Petitioner's Collective Exhibit 150).

(Transcript, at 613-663). By describing Petitioner's history of earnestly seeking a religious faith with which to align himself, Dr. McCoy's testimony would have supported the notion that Petitioner had been strongly influenced by the SEGM. None of this was put into evidence before the jury. The failure of counsel to do so was a serious error.

Trial counsel could have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society during the year before he came to Tennessee. If they had heeded Petitioner's suggestion that they talk with Sarah Roberts Walton, Petitioner's former fiancé, they could have learned that after Petitioner was released from prison in Chicago, in 1983, he was hard-working and giving. Ms. Walton, now an attorney for the State of Maine,[35] testified that when she knew the Petitioner in 1983, he held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence. (Transcript, at 1181, 1195-1196, 1197, 1205; Bretzlauf deposition, at 14-15, 17).[36] Ms. Walton described the Petitioner as gentle, caring, and filled with dignity; a person with whom she shared a sincere Christian belief. (Transcript, at 1204-1205). The jury heard nothing of the sort from any witness. This was a very significant failure by defense counsel.

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[35] Ms. Walton has represented the State of Maine on two murder appeals. (Transcript at 1182).

[36] Ms. Walton ultimately broke off the engagement because she was concerned that Petitioner had psychological problems. (Transcript, at 1189-1190). Petitioner subsequently moved to Tennessee the year before the stabbings to be close to his brother, Mark Jones, who was stationed at Fort Campbell. (Transcript, at 1195).

The Court finds the testimony of Ms. Walton to be extremely credible. The content of her testimony, as well as her demeanor, made her a compelling mitigation witness on behalf of Petitioner for purposes of sentencing. Ms. Walton's testimony, based on personal knowledge, added a humanizing dimension to the life history and character of the Petitioner, good and bad, that was absent from any prior proceeding in state court, and yet could have been presented to the jury, had trial counsel conducted a reasonable investigation.

Had defense counsel learned more about the 1972 murder conviction, they could have presented evidence to the jury that the killing occurred when Petitioner approached the victim, Michael Stein, in his cell to confront him about spreading rumors that Petitioner had engaged in homosexual conduct, and that Petitioner stabbed Stein during that confrontation. (Bishop Deposition, at 22-23, 24-25, 26, Petitioner's Exhibit 135; Delagrange Deposition, at 18-19, Petitioner's Exhibit 136; Petitioner's statement dated April 2, 1972, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Letter dated April 15, 1987 from David G. Lowe to John Zimmerman, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Memo dated April 7, 1972 from H.R. Hogan to Norman A. Carlson, attached as Exhibit to

Delagrange Deposition, Petitioner's Exhibit 136).[37] The prison murder was not about drugs and gangs as represented by the prosecution to defense counsel.

More importantly, Dr. Masri testified at the 1972 murder trial that Petitioner had a "homosexual panic" and lost control when he killed Stein. (Petitioner's Exhibit 131, at 48). As noted above, Dr. Masri also diagnosed the Petitioner as having a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). Although this information does not provide a justification for the murder, it does provide the jury with some information upon which to evaluate it. Without some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he was not deserving of any leniency. The jury heard none of this evidence. Again, defense counsel made a substantial mistake.

Instead, at the sentencing hearing, the jury heard only two witnesses for the defense, the Petitioner and his wife. The defense was breathtakingly brief in content, and lacking in quality, and quantity. (Addendum 1, at 1836-1930). Petitioner's testimony on direct was essentially limited to his relationship with SEGM, his account of the events surrounding the stabbings, and a plea for his life. (Addendum 1, at 1836-1870). During cross-examination, the Petitioner initially

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[37] In response to a claim made by Mrs. Stein after her son's death, representatives of the federal institution where he had been incarcerated took the position that:

> Mr. Stein was a member of a group of inmates who were attempting to apply extortionate pressures on Jones to submit to Stein's demands for homosexual activities. The assault itself on April 1 arose out of an attempted assault on Jones approximately two weeks earlier by members of this group.

(Petitioner's Collective Exhibit 142; Bishop Deposition, at 25, Exhibit 135).

lost his composure, and was not particularly articulate in answering the prosecutor's questions. (Addendum 1, at 1870-1905). Mr. Camp described the Petitioner's performance as "one of the saddest things I have seen in my legal career." (Transcript, at 731).[38]

The only line of questioning put to Petitioner's wife, Susi Bynum Jones, related to whether she had written some bad checks before Petitioner was incarcerated. (Addendum 1, at 1919-1929).[39] Counsel did not even attempt to elicit testimony from Mrs. Jones that she loved her husband, found good in him, or hoped he would not be executed.[40]

The jury in this case heard no witnesses who expressed a concern whether Petitioner lived or died, even though such witnesses were available and known to defense counsel. This was a grievous flaw.

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[38] Mr. Camp described trial counsels' deficiencies regarding Petitioner's testimony:

> It is my opinion that Mr. Jones was not prepared to go on the stand, that because of what I perceived to be his mental health problems that it would be hard for him to have been successful on the stand because we had not provided the factual foundation that the jury needed to be able to hear this man in context, that all they got was literally this man begging for his life.
>
> And it was more than he could handle and that he just broke down.

(Transcript, at 731).

[39] Even though he conducted the direct examination of the Petitioner's wife, the only mitigation witness offered besides the Petitioner, Mr. Camp did not conduct an interview with her prior to trial. (Transcript, at 724; 1248, 1250).

[40] Ms. Jones spoke effervescently about her husband at the hearing in this case. "Well, when I first met James, he opened up his mouth, it was like thunder from heaven ... I was fascinated with James ... he was different, just different from any man I had ever met ... he wanted to do something for the world. I was intrigued by that." (Transcript, at 1216).

As Respondent argues, and the state courts found, there was also a considerable amount of negative evidence that the prosecution could have introduced during the sentencing hearing. That evidence includes a criminal record which indicates that Petitioner was convicted of assault at the age of 15, and two more assaults at the age of 19. (Petitioner's Exhibit 105; Petitioner's Exhibit 146; Respondent's Collective Exhibit 9; Respondent's Collective Exhibit 10). As noted above, Petitioner was convicted of the second degree murder of Michael Stein at the age of 21. (Petitioner's Exhibit 105).

Petitioner has been diagnosed as having a sociopathic personality disturbance with anti-social reaction and mild depression, (March 10, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9), as having an anti-social personality (November 7, 1968 -- Fort Meade, Maryland, Respondent's Collective Exhibit 10; June, 1977 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 59), and as having a psychopathic personality. (January 13, 1978 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 67).

Petitioner has also been diagnosed as having no mental illness. (April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; December 31, 1969 -- St. Elizabeth's Hospital, Respondent's Collective Exhibit 11; April, 1970 -- Dr. Angus, Respondent's Collective Exhibit 6, Tab 101; Dr. Eardley testimony at Stein murder trial, Petitioner's Exhibit 131, at 57-58, 59, 66).

The prosecution could have introduced evidence that during his many years in prison, Petitioner was involved in numerous citations for misconduct, including possession of a knife. (Respondent's Collective Exhibit 6). Prison records would also show that Petitioner escaped

shortly before his parole date in 1982, but was recaptured a few months later. (Respondent's Collective Exhibit 6, Tab 94). While on escape, Petitioner was a witness in a murder case.

Petitioner's army records indicate that during his service in the army, Petitioner was absent without leave on more than one occasion, and ultimately, was discharged under conditions other than honorable. (Respondent's Collective Exhibit 10).

Finally, Petitioner's school records indicate that he was suspended from school for threatening a teacher with a knife. (May 24, 1965 -- Sayre Junior High School, April 25, 1966 -- Shaw Junior High School, Respondent's Collective Exhibit 7; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9).

Notwithstanding this negative evidence, however, the Court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution. (Tenn. Code Ann. § 39-2-203; Exhibit 155). No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty.

This is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence -- none -- being offered to the jury despite its availability and abundance. Defense counsel was substantially ineffective and Petitioner was thereby deprived of a constitutionally fair trial.

Petitioner stated it succinctly to the jury at sentencing:

> I don't know you. You don't know me. So, it ain't no feeling there what you should do to me.

(Addendum I, at 1869, lines 15-16).

According to the prosecutor's assessment after trial, given the paucity of evidence that was presented by Petitioner's attorneys, the jury had little reason to hesitate in imposing the death penalty: "The jurors all expressed to us their satisfaction with their verdict and were quite surprised at their own ability to impose the death penalty on this particular man with no reluctance whatsoever." (Letter dated July 17, 1987 from John Zimmerman to David G. Lowe; Petitioner's Collective Exhibit 136).

The Court acknowledges that Lionel Barrett and Sumter Camp have good reputations in the Nashville bar for being fine criminal defense lawyers. This case illustrates that lawyers do not make cases based on their reputations. A lawyer must actually work on each case. Cases are made through factual investigation, research, writing, witness preparation, trial strategy, and a bit of good fortune. In this case, the hard work required was simply not done. This Court agrees with the state post-conviction trial and appellate courts that Mr. Barrett and Mr. Camp provided inadequate representation. Good lawyers can and do fail. Here, Mr. Barrett and Mr. Camp utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death.[41] This is not a case of harmless error.

This conclusion is not one the Court reaches casually. The Court is mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and

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[41] Mr. Barrett as lead counsel, and Mr. Camp as assistant counsel, each had an independent duty to provide effective assistance of counsel.

finality of court judgments. This Court has no interest in simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts,[42] and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand. The Constitution of the United States, and this Court's duty to uphold its principles, mandate the issuance of the writ of habeas corpus as to Petitioner's death sentence.

IX. Conclusion

All Petitioner's claims are procedurally defaulted except Petitioner's Brady claims, trial counsel conflict of interest claim, the ineffective assistance of counsel claim, and those claims already addressed by the Court in previous orders. The Court concludes that Petitioner's Brady claims, and conflict of interest claims, are without merit, and they are dismissed.

With respect to Petitioner's ineffective assistance of counsel claim, the Court concludes that Petitioner received ineffective assistance of counsel during the sentencing phase of his trial, and therefore, Petitioner's petition for a writ of habeas corpus relief is granted as to that claim. Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. As noted above, Petitioner is also serving two consecutive life terms for assault with intent to commit murder and armed robbery and shall remain incarcerated.

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[42] For example, Nancy Lancaster, Sarah Roberts Walton, Robert Sadoff, Diana McCoy, Kris Sperry, Raymond Winbush and Brian Stephenson were not called as witnesses in the state post-conviction proceeding.

It is so ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

FILED

SEP 13 2000

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-6568; 98-6569

ABU-ALI ABDUR'RAHMAN,
Petitioner - Appellee/Cross-Appellant,

v.

RICKY BELL, Warden,
Respondent - Appellant/Cross-Appellee.

Before: SILER, BATCHELDER, and COLE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's finding of prejudice at the sentencing stage is REVERSED; the district court's judgment granting the petition for a writ of habeas corpus as to petitioner Abu-Ali Abdur'Rahman's death sentence is VACATED; the district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX

ABU-ALI ABDUR'RAHMAN,
Petitioner-Appellee/Cross-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellant/Cross-Appellee.

Case Nos. 98-6568/6569

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 96-00380--Todd J. Campbell, District Judge.

Argued: January 31, 2000
Decided and Filed: September 13, 2000

Before: SILER, BATCHELDER, and COLE, Circuit Judges.

COUNSEL

ARGUED: Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, for Appellee. **ON BRIEF:** Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, Brian K. Frazier, NEAL & HARWELL, Nashville, Tennessee, for Appellee.

SILER, J., delivered the opinion of the court. BATCHELDER, J. (pp. 34-41), delivered a separate concurring opinion. COLE, J. (pp. 42-50), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SILER, Circuit Judge. Respondent, Ricky Bell, Warden ("State"), appeals the issuance of a writ of habeas corpus to Petitioner, Abu-Ali Abdur'Rahman ("Petitioner"),[1] vacating Petitioner's sentence of death for first-degree murder on the grounds of ineffective assistance of counsel at the sentencing phase of Petitioner's trial. Additionally, Petitioner cross-appeals the denial of his petition for a writ of habeas corpus seeking relief from his conviction for first-degree murder. We reverse the district court's finding that Petitioner was prejudiced by his trial counsel's deficient performance at the sentencing stage and vacate the portion of the district court's judgment granting the petition for a writ of habeas corpus as to the death sentence. Additionally, we affirm the portion of the district court's judgment denying the petition for a writ of habeas corpus as to the conviction.

I. BACKGROUND

Petitioner was tried and convicted of first-degree murder, assault with intent to commit murder, and armed robbery. He received the death penalty for the murder conviction and two consecutive life terms for the each of the other convictions. The death sentence was imposed pursuant to the jury's finding of three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; and (3) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first-degree murder, arson, rape, robbery, burglary, theft, or kidnapping. Petitioner's convictions arose out of an offense that occurred in 1986.

On February 16, 1986, Petitioner purchased a small amount of marijuana from Patrick Daniels at the duplex in which Daniels lived in Nashville, Tennessee. Petitioner and Harold Devalle Miller later agreed to rob Daniels. The plan

[1]Petitioner was originally named James Lee Jones, but he changed his name to Abu-Ali Abdur'Rahman.

was for Petitioner to enter the duplex under the pretext of making a drug purchase, at which point Miller would force his way into the duplex and "rob" both Daniels and Petitioner with a shotgun that Petitioner had supplied. This plan was never executed, however, as Miller became too frightened to go through with it. Petitioner then formulated a second plan to rob Daniels, this time using a knife to avoid making too much noise.

On February 17, 1986, Petitioner, armed with a shotgun, and Miller, armed with an unloaded pistol, entered the duplex under the pretext of making a drug purchase. Petitioner and Miller displayed their firearms and forced Daniels and his girlfriend, Norma Norman, to the floor. Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes, and mouth. After stealing Daniels's bank card, Petitioner forced Daniels to reveal his PIN number. Petitioner also searched the house and found some marijuana in some sofa cushions.

Petitioner then told Daniels that he had been sent from Chicago to "clean up everything" and that he was there to teach Daniels a lesson. Petitioner obtained a butcher knife from the kitchen and stabbed Daniels six times in the chest, penetrating his heart four times. Prior to and during the stabbing, Daniels was crying and begging Petitioner not to hurt anyone. After Daniels became motionless, Petitioner stabbed Norman in the back several times, but Miller pulled Petitioner away and the two men fled, leaving the knife in Norman's back. Daniels died as the result of his wounds, but Norman survived. Petitioner and Miller also took $300 from a box in Norman's bedroom.

At trial, Petitioner argued that the real motivation for the crime was born out of the influence of his membership in a "quasi-religious paramilitary group" called the Southeastern Gospel Ministry ("SEGM"). Petitioner had a long criminal history, including a conviction for second-degree murder in 1972 and a conviction for assault with a dangerous weapon (a knife) in 1970. Following his incarceration for these offenses, he moved to a halfway house in Nashville. While living at the halfway house he worked for an organization called the Baptist Publishing Board, and eventually met Allen

Boyd, one of the Board's owners, and Boyd's associate, William Beard. Boyd and Beard were the leaders of the SEGM; Miller was also a member of the SEGM. One of the alleged goals of the SEGM was to cleanse the black community of drug dealers and other undesirable elements. Boyd allegedly furnished the shotgun used during the offense and assisted Petitioner and Miller after the offense, including giving Miller some money to flee.

Petitioner was initially represented by Neal McAlpin, who was asked by Boyd to take on the representation. Boyd allegedly indicated to McAlpin that he would be paying Petitioner's attorney's fees. However, McAlpin subsequently determined that Boyd was a member of the SEGM. With Boyd being the source of his fees, as well as perhaps being involved in the crime, McAlpin felt that a conflict of interest existed within the third-party fee arrangement and that he could not continue the representation. Gail Hughes, an associate of Boyd's, then requested that Lionel Barrett represent Petitioner. Barrett agreed to do so for a retainer fee of $15,000, $5,000 of which was paid to him fairly soon, though he never inquired as to the source of the funds. Barrett and another attorney, Sumter Camp, represented Petitioner at trial.

Petitioner alleges that this representation was ineffective throughout the trial, including both the guilt phase and the sentencing phase. Barrett testified that at the time he received the first $5,000 of the retainer he decided he was not going to perform any work on the case until he received the balance of the retainer fee, a balance that was never paid. Petitioner also claims that Barrett performed no work on the case until he filed pre-trial motions. Petitioner alleges that Barrett's performance as counsel was ineffective due to failure to: (1) investigate; (2) present potentially exculpatory evidence; and (3) present mitigating evidence at the sentencing stage.

His conviction and sentence were affirmed by the Tennessee Supreme Court in *State v. Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990). He sought post-conviction relief in the state trial court which conducted a hearing, made findings, and denied relief. The judgment was affirmed in *Jones v. State*, No. 01C01-9402-CR-00079, 1995

WL 75427 (Tenn. Crim. App. Feb. 23, 1995), and the Tennessee Supreme Court denied review. The United States Supreme Court denied a petition for a writ of certiorari in *Jones v. Tennessee*, 516 U.S. 1122 (1996). Petitioner later filed this petition for a writ of habeas corpus, challenging both his conviction and sentence. After Petitioner's motion for partial summary judgment was denied, the district court held an evidentiary hearing to address the merits of his habeas petition. The district court granted the writ on Petitioner's claim of ineffective assistance of counsel at the sentencing stage due to counsel's failure to present mitigating evidence despite its availability. However, the district court denied Petitioner's claim of ineffective assistance of counsel at the guilt stage, holding that although the performance of Barrett and Camp was deficient, Petitioner suffered no prejudice thereby. *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998). This is an appeal from that decision.

II. DISCUSSION

A. State's Appeal Challenging the Judgment Granting the Petition for a Writ of Habeas Corpus as to the Death Sentence

1. Presumption of Correctness Under 28 U.S.C. § 2254

The State argues that the district court improperly dispensed with the presumption of correctness that is to be accorded to state court findings of fact under 28 U.S.C. § 2254(d)[2] without providing a statement of its reasons for

[2] 28 U.S.C. § 2254(d) (repealed), in effect when the instant petition was filed, states:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;

doing so as required by *Sumner v. Mata*, 449 U.S. 539 (1981), and *Mitchell v. Rees*, 114 F.3d 571 (6th Cir. 1997). Petitioner responds that claims of ineffective assistance of counsel involve mixed questions of law and fact that are not accorded the presumption of correctness under *Strickland v. Washington*, 466 U.S. 668 (1984).

The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the following factual findings in the process:

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(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at Dupont Jr. High School at Ft. Lewis, Washington.
4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.
5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.
6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.
7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.
8. Testimony and files of trial counsel showed that they failed to investigate and obtain available

information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.

9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI [Middle Tennessee Mental Health Institute] per their request.

10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.

11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.

12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.

13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

Abdur'Rahman, 999 F.Supp. at 1093. The district court referred to these findings in its opinion partially granting habeas relief, but did not address the presumption of correctness that arguably applied to them under 28 U.S.C. § 2254. Instead, citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984), and *Queen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996), it merely noted that "[t]he ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo." *Abdur'Rahman*, 999 F.Supp. at 1092.

This was an accurate statement of the law by the district court, though not a complete one. A close reading of the

relevant portion of *Strickland* indicates that while the ultimate question of ineffective assistance of counsel is a mixed question of law and fact, the factual findings of state courts underlying such an analysis are accorded the presumption of correctness:

> **Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d),** and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698 (emphasis added). Thus, the state post-conviction trial court's findings of fact underlying its ineffectiveness inquiry should have been presumed correct.

This presumption is not mandatory because a district court may preclude its application upon the finding of any one of the listed exceptions in 28 U.S.C. § 2254(d). However, in order to do so "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Sumner*, 449 U.S. at 551. In the recent opinion in *Mitchell v. Rees*, this court discussed this requirement.

> We begin with the application of 28 U.S.C. § 2254(d), which establishes a presumption of correctness for factual determinations made by the state courts whose judgments are challenged by the federal habeas petitioner. The Supreme Court, in *Sumner v. Mata*, held that § 2254(d) mandated that the presumption of correctness be applied by the habeas court to a finding of the state appellate court that "'the facts of the present case' did not adequately support respondent's claim." The Court went on to lay down the rule that "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that

the state finding was 'not fairly supported by the record.'" The reason for this requirement, the Court explained, is that "[n]o court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)." And in a footnote, the Court further explained that "the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of [federal court] jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, and have repeatedly since reaffirmed, 'it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded.'"

. . . It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"

Mitchell, 114 F.3d at 575-77 (citations omitted). Thus, the district court committed the same error by apparently dispensing with the presumption of correctness without a statement of its reasons for granting relief notwithstanding the provisions of § 2254(d).

Relying solely upon the erroneous argument that the presumption of correctness does not apply to the post-conviction trial court's findings of fact, Petitioner fails to argue that any one of the listed exceptions in § 2254(d) applies and requires that the court dispense with the presumption of correctness. However, he argues that § 2254(d)(8) would entitle him to an evidentiary hearing, pointing to evidence in the record allegedly showing that he did not receive a full and fair hearing in state court at trial, during post-conviction proceedings, and on appeal. The State argues that due to Petitioner's formal presence before the state trial and appellate courts, his ability to call witnesses and otherwise present evidence, and his pursuit of his claims on

appeal, he cannot be heard to claim that he did not receive a full and fair hearing. This position is correct. *See Andrews v. Collins*, 21 F.3d 612, 619 (5th Cir. 1994) (noting that the opportunity to present evidence, to present witnesses, and to fully cross-examine prosecution witnesses supports the finding of a full and fair hearing); *see also Sumner*, 449 U.S. at 546 (stating that "[s]ince that court [state appellate court] was requested to determine the issue by respondent [the convicted murderer], we do not think he may now be heard to assert that its proceeding was not a 'hearing' within the meaning of § 2254(d)."). Thus, because Petitioner received a full and fair hearing the presumption of correctness applies.

It is clear that the court erred in not addressing the presumption of correctness as required by *Sumner*, *Strickland*, and *Mitchell*. However, it is unclear as to whether the district court held that the presumption of correctness did not apply. This ambiguity arises because the district court ordered an evidentiary hearing and received evidence that was not presented in any of the state court proceedings. Additionally, it considered the new evidence in its opinion partially granting habeas relief to Petitioner, yet failed to explicitly find whether the new evidence contradicted and possibly rebutted the presumption of correctness, or merely supplemented the post-conviction trial court's findings of fact.

Presumably, however, because the court simply exercised de novo review under its mistaken interpretation of *Strickland* it did dispense with the presumption of correctness. Thus, the district court erred by failing to recognize that the presumption of correctness applied to the post-conviction trial court's findings of fact and erred by failing to include in its opinion the reasoning why the presumption of correctness did not apply. Unlike *Mitchell*, however, this error does not require a remand because we hold that the district court properly ordered an evidentiary hearing and properly considered the evidence it heard.

2. Inherent Discretion to Order an Evidentiary Hearing

Applying the presumption of correctness under § 2254(d) is an entirely separate and distinct issue from whether a district court may or is required to order an evidentiary hearing to settle allegedly disputed issues of material fact. However, as a practical matter, when a district court finds that the presumption of correctness does not apply due to one of the listed exceptions in § 2254(d), a hearing is probably warranted. As discussed below, this is an issue that is independent of whether a habeas Petitioner is *entitled* to an evidentiary hearing. This latter issue is not raised by the instant appeal, because the district court properly ordered an evidentiary hearing pursuant to its inherent discretionary authority.

The district court ordered an evidentiary hearing "to resolve the numerous complex factual and legal issues presented." The State argues that the district court abused its discretion in ordering an evidentiary hearing because *Mitchell* does not allow for such a hearing in the absence of a finding of one of the § 2254(d) factors. Alternatively, it argues that Petitioner is not entitled to an evidentiary hearing due to his failure to show either cause and prejudice for the failure to develop the facts in the state proceedings or that a fundamental miscarriage of justice would result from the district court's failure to hold an evidentiary hearing. Petitioner responds by attempting to distinguish *Mitchell* and by arguing that a district court has inherent authority to order an evidentiary hearing to settle claims of ineffective assistance of counsel.

As the above-quoted portion of *Mitchell* shows, this court has held that a district court does not have the authority to order an evidentiary hearing when it fails to properly dispense with the presumption of correctness. Additionally, this court succinctly discussed the cause and prejudice requirements that the State argues are relevant to this appeal:

> Because § 2254(d) is an express limitation on the district court's jurisdiction, a district court is without authority to hold an evidentiary hearing on a matter on which the state court has made findings unless one of

> the factors contained in § 2254(d) applies. It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"
>
> Once a district court has properly determined that it may dispense with the presumption of correctness mandated by § 2254(d), the court has some discretion in determining whether to hold an evidentiary hearing. However, an [sic] habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Therefore, a district court abuses its discretion by ordering such a hearing without first requiring the petitioner to make the requisite showing.

Mitchell, 114 F.3d at 577 (citations omitted). Thus, strictly on the basis of *Mitchell*, because the district court did not find that one of the factors contained in § 2254(d) supplies, the court lacked the authority to order an evidentiary hearing.[3]

Petitioner argues that *Mitchell* is inconsistent with both Supreme Court authority and other authority emanating from this Circuit which recognizes that district courts always have

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[3] Petitioner attempts to distinguish *Mitchell* by arguing that the *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge involved therein was based solely upon factual state court findings, whereas the instant case involves an ineffectiveness of counsel claim that was clearly a mixed finding of fact and law. In turn, Petitioner argues that because the presumption of correctness does not apply in the instant case, *Mitchell* is not applicable and therefore not controlling. However, as the above-stated conclusion shows, the presumption of correctness does apply to the post-conviction trial court's findings of fact. Thus, Petitioner's attempt to distinguish *Mitchell* is erroneous.

the inherent authority to order evidentiary hearings to settle disputed issues of material fact. Petitioner cites and quotes to *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), for the proposition that "the power of inquiry on federal habeas review is plenary." *Id.* at 312. Although *Townsend* was partially overruled as discussed below, the Court set out six situations in which a district court on habeas review must hold an evidentiary hearing. *Id.* at 313-14. Additionally, the Court stated that:

> [t]he purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

Id. at 318. Thus, it seems that despite the holding in *Mitchell*, a district court does have the inherent authority to order an evidentiary hearing even if the factors requiring an evidentiary hearing are absent.

This issue was further discussed in *Keeney*, which partially overruled *Townsend* by holding that the cause and prejudice test applies to a habeas petitioner's failure to develop material facts at the state court level. *See Keeney*, 504 U.S. at 5. In so holding, the Court discussed in a footnote the relation between the instances listed in *Townsend* in which a district court must hold an evidentiary hearing and the exceptions to the presumption of correctness listed in § 2254(d):

> First, it is evident that § 2254(d) does not codify *Townsend's* specifications of when a hearing is required. *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it

> lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

Id. at 10 n.5. Thus, this passage indicates the continuing viability of *Townsend's* statement that a district court may order an evidentiary hearing to settle disputed issues of material fact even following the adoption of the exceptions to the presumption of correctness listed in § 2254(d).

Thus, *Mitchell's* statement that a district court is without authority to order an evidentiary hearing in the absence of one of the exceptions listed in § 2254(d) is overbroad in that it fails to recognize the inherent authority that a district court always has in habeas cases to order evidentiary hearings to settle disputed issues of material fact. This court has previously recognized this principle. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) (quoting *Townsend* for the proposition that a district judge's power to receive evidence on a habeas petitioner's constitutional claim is only constrained by his sound discretion). Other Circuits have likewise recognized this inherent discretion. *See Seidel v. Merkle*, 146 F.3d 750, 754-55 (9th Cir. 1998); *Clemmons v. Delo*, 124 F.3d 944, 952 (8th Cir. 1997); *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993).

Of course, recognizing a district court's inherent discretion to order an evidentiary hearing is an issue that is separate and distinct from whether a habeas petitioner is *entitled* to an evidentiary hearing. As Petitioner correctly points out, *Keeney* and *Mitchell* stand for the proposition that a:

> habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."

Mitchell, 114 F.3d at 577 (quoting *Keeney*, 504 U.S. at 11-12). Because the district court properly ordered an evidentiary hearing pursuant to its inherent authority to do so, the issue of whether Petitioner is entitled to an evidentiary hearing is irrelevant and will not be addressed.

Following the oral arguments in this case, the Supreme Court decided *Williams v. Taylor*, 120 S.Ct. 1479 (2000), in which it interpreted the fault requirement of a provision of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). The specific provision that was at issue states that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows [the existence of two limited exceptions]." 28 U.S.C. § 2254(e)(2). While the use of the word "shall" in this provision may evidence the Congressional intent to remove a district court's inherent discretion to order an evidentiary hearing in the absence of either of the provided exceptions, this provision does not apply to the instant appeal because Petitioner filed his habeas petition on the day before the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997) (holding that AEDPA only applies to petitions filed after the date of its enactment). While there may not be any inherent discretion to order an evidentiary hearing following the enactment of AEDPA, we decline to specifically determine whether AEDPA has so altered the law. *Williams* does not, therefore, lead to the conclusion that the district court erred below.

Additionally, although *Williams* characterized the *Keeney* decision as "requir[ing] the prisoner to demonstrate cause and prejudice excusing the default before he could receive a hearing on his claim," *id.* at 1488, the use of the word "could" does not imply that if the district court ordered a hearing based upon its inherent discretion, it erred. Thus, the distinction between when a petitioner is entitled to a hearing, which was at issue in *Keeney*, versus whether a district court has the inherent discretion to order a hearing, is still intact following *Williams*.

3. Ineffective Assistance of Counsel

Recognizing that in a habeas case a district court has the inherent authority to order an evidentiary hearing to settle disputed issues of material fact obviously raises the issue of how any evidence received by the district court is to be considered if the court holds that the presumption of correctness under § 2254(d) applies. The post-conviction trial court concluded that Petitioner's trial counsel's performance was deficient during the sentencing phase due to the failure to investigate and obtain information about Petitioner's background and mental health. However, it went on to hold that Petitioner suffered no prejudice at the sentencing stage because the evidence that he would have offered to support a finding of mitigating circumstances was both helpful and harmful and that it would not have been a prudent strategy to present the evidence. The Tennessee Court of Criminal Appeals affirmed that decision. *See Jones*, 1995 WL 75427, at *2. The State argues that in the absence of the evidence presented at the evidentiary hearing below, the state court findings of fact show deficient performance on the part of Petitioner's trial counsel, but do not show any prejudice from that deficient performance. Petitioner responds by arguing that the state court findings of fact do show that he was prejudiced by trial counsel's deficient performance.

Strickland set forth the test for determining when the ineffective assistance of counsel so prejudices a defendant that his sentence must be set aside. First, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance of counsel under the Constitution." *Strickland*, 466 U.S. at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally,

> [w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer–including an appellate court, to the extent it independently reweighs the evidence--would have

concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. Finally, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Of course, as stated above, the prejudice prong of the *Strickland* test is a mixed question of law and fact that is reviewed de novo.[4] Nevertheless, the state court findings of fact should be accorded the presumption of correctness under § 2254(d). The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the factual findings set forth above in the process. Based upon these findings of fact, the post-conviction trial court found that Petitioner did not suffer any prejudice from the deficient performance, a holding that the Tennessee Court of Criminal Appeals affirmed:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial. As the Supreme Court of the United States noted in *Strickland v. Washington*, 466 U.S. 668, 700 (1984), "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances

[4] Neither party argues that any error has ever been committed with respect to the performance prong of the *Strickland* test.

> outweighed the mitigating circumstances and, hence, the sentence imposed." Indeed proof of the appellant's psychological history in all probability would not have changed the result, especially in light of appellant's conviction of prior malicious killing while in a federal penitentiary and the other aggravating factors. A decision of counsel relating to a choice of trial or appellate strategy, even if it were proven improvident, could not form the basis for an ineffective assistance of counsel claim.

Jones, 1995 WL 75427, at *2.

Petitioner argues that this conclusion was in error, citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), for the proposition that the capital sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death." *Id.* Petitioner's reliance upon *Lockett* is misplaced as it involved the presentation of evidence of mitigating circumstances that was deemed not to fit within Ohio's narrow death penalty statute. *See id.* at 594-95. In the instance case, Petitioner did not "proffer" any evidence that the jury was precluded from considering.

Petitioner also relies upon *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995), for the proposition that "[o]ur sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity." *Id.*

Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. We reach this conclusion even considering the evidence presented at the evidentiary hearing below. When a district court in a habeas case orders an evidentiary hearing to settle disputed issues of material fact pursuant to its inherent authority to do so, that evidence could be offered for a variety of purposes, though the most common presumably would be to rebut the presumption of correctness accorded to state court findings of fact. *See Groseclose v.*

Bell, 130 F.3d 1161, 1163-64 (6th Cir. 1997) (stating that "federal courts must defer to state court factual findings, according a presumption of correctness that the petitioner may rebut only with clear and convincing evidence."). However, in the instant case, the additional evidence and factual findings made by the district court do not contradict the factual findings made by the post-conviction trial court. *Compare Abdur'Rahman*, 999 F.Supp. at 1093, *with id.* at 1094-1102. Instead, the additional evidence seems to merely supplement the factual findings made by the post-conviction trial court. *See Pollinzi v. Estelle*, 628 F.2d 417, 418 (5th Cir. 1980) (allowing evidence obtained at an evidentiary hearing to supplement the trial transcript and record).

Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Criminal Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. Thus, the decision of the district court that Petitioner was prejudiced at the sentencing stage due to his counsel's deficient performance is reversed.

4. Heinous, Atrocious, or Cruel Instruction

On cross-appeal, Petitioner argues that the "heinous, atrocious, or cruel" aggravating circumstance instruction that was given to the sentencing jury was unconstitutionally vague and overbroad, relying upon *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), and *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995). The district court concluded that even if the

instruction was vague, any error caused thereby was cured by the Tennessee Supreme Court's application of a constitutional narrowing construction to the aggravating circumstance. The State argues that if the instruction was unconstitutionally vague, any error was harmless due to the jury's finding of other aggravating circumstances.

In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Court addressed the vagueness of a similar instruction and set forth the following standard to employ:

> Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
>
> *Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Id. at 361-62 (citations partially omitted).

The death penalty instruction in the instant case stated:

> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * * * * *

(2) the murder was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind;

* * * * * *

In determining whether or not the State has proved aggravating circumstance number two above, you are governed by the following definitions. You are instructed that the word heinous means grossly wicked, or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful--causing suffering--excuse me--painful. Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Depravity means moral corruption, wicked, or preverse (sic) act.

Abdur'Rahman, 990 F.Supp. at 987.

In *Maynard*, the Court held that an instruction including as an aggravating factor that the murder was "especially heinous, atrocious, or cruel" was unconstitutionally vague, though the Court left open the possibility that certain limiting constructions of that instruction would be constitutionally acceptable. *Id.* at 364-65. Additionally, it noted that "some kind of torture or serious physical abuse" limiting instruction may pass constitutional muster. *See id.* Following *Maynard*, this court held unconstitutionally vague an instruction stating a specified statutory aggravating circumstance as: "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Houston*, 50 F.3d at 387.

We decline to pass on the constitutionality of the instruction in this case because any error therein was harmless. "[W]henever an aggravating factor has been invalidated in a weighing state,[5] the sentence must be

[5] "Tennessee is a 'weighing' state—that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death must be imposed." *Houston v. Dutton*, 50 F.3d 381, 387 (6th Cir. 1995).

reweighed or analyzed for harmless error if the sentence is to be affirmed." *Coe*, 161 F.3d at 334. The *Coe* court went on to state that:

> In a weighing state . . . when a court invalidates one of the aggravators, it has removed a mass from one side of the scale. There is no way to know if the jury's analysis—how the aggravating and mitigating circumstances balanced—would have reached the same result even without the invalid factor.
>
> . . .
>
> [I]t is only when the "death sentence has been infected by a constitutionally . . . invalid aggravating factor" that state reweighing is required to preserve the verdict. By definition, though, an error that is harmless does not "infect" the sentence and does not require reweighing by the state.
>
> . . .
>
> We turn, therefore, to analyze this error for harmfulness. The question we must ask is whether the error "had substantial and injurious effect or influence in determining the jury's verdict."

Id. at 334-35. In *Coe*, the error was deemed harmless because the jury made the narrow finding that "the murder was especially heinous, atrocious, or cruel and involved torture," when it had been charged to find that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Id.* at 335.

Unfortunately, the jury's verdict form in the instant case was not preserved. However, the Supreme Court of Tennessee made the factual finding that the jury had found the three aggravating circumstances as set forth above in the Background section. *See State v. Jones*, 789 S.W.2d 545, 550 (Tenn. 1990). These factual findings are accorded the presumption of correctness under 28 U.S.C. § 2254(d). *See Sumner*, 449 U.S. at 546 (stating that § 2254(d) "makes no distinction between the factual determinations of a state trial court and those of a state appellate court."). Additionally, Petitioner has neither offered any argument as to why this presumption should not apply, nor any evidence that the jury did not find the three aggravating circumstances.

As the State correctly points out, there was ample evidence to support the aggravating circumstances that Petitioner had been previously convicted of one or more felonies involving the use or threat of violence to the person and that the instant murder was committed while the Petitioner was engaged in committing, or attempting to commit, any first degree murder or robbery. *See State v. Jones*, 789 S.W.2d at 550 (stating that "[t]here is no doubt that the evidence in this case was sufficient to support each of the aggravating circumstances found by the jury."). As quoted above, the *Coe* court found that removing one aggravating circumstance from the sentencing calculus in a weighing state normally would require a re-weighing of the aggravating and mitigating factors. *See Coe*, 161 F.3d at 334. However, in the instant case, as the district court found, "[t]his is a case of no mitigating evidence--none--being offered to the jury despite its availability and abundance." *Abdur'Rahman*, 999 F.Supp. at 1101. Thus, even if the heinous, atrocious, or cruel aggravator is removed form the calculus, there is no mitigating evidence to weigh against the remaining prior felony conviction and felony murder aggravators. Therefore the error was harmless in that it did not have a substantial and injurious effect or influence in determining the jury's verdict.[6]

5. Petitioner's Unanimity Objection to the Sentencing Instructions

Petitioner argues that the sentencing instructions improperly led the jurors to believe that they had to unanimously find any mitigating circumstances and did not specifically instruct them otherwise. Although no direct instruction was given requiring that the jurors find the existence of each mitigating factor unanimously, Petitioner argues that the jury was repeatedly informed that their decisions had to be unanimous, but were not instructed that

[6] This conclusion is not affected by our holding that the district court properly considered the evidence it obtained during the evidentiary hearing because although that evidence contained mitigating circumstances that could have been offered at the sentencing stage, Petitioner does not argue that a re-weighing is necessary on this basis. Thus, in terms of possible re-weighing, we look only to the evidence presented at the sentencing stage.

they did not have to be unanimous as to mitigating circumstances. The district court held that "there is not a reasonable likelihood that the jury interpreted the instructions to require unanimity as to mitigating circumstances. . . . [t]his Court is not persuaded that silence as to finding a mitigating circumstance would likely lead the jury to believe that unanimity was required in this case." *Abdur'Rahman*, 990 F.Supp. at 994. This holding was correct.

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Court held that sentencing instructions that create a substantial likelihood that reasonable jurors might think that they are precluded from considering any mitigating evidence in the absence of unanimity are constitutionally invalid. *See id.* at 384. The standard for reviewing such a challenge to the jury instructions "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

In the instant case, the substantive portions of the trial court's instructions were:

> Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.
>
> * * * * * *
>
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * * * * *
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated any mitigating circumstances which shall include, but not be limited to the following:
>
> * * * * * *
>
> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved

by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death. If the death penalty is the decision of the jury the members of the jury shall then complete the attached form entitled, quote:

Punishment of Death

End quote.

The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.

If the jury unanimously determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

Abdur'Rahman, 990 F.Supp. at 993. Additionally, at the end of the instructions the trial court stated that "[t]he verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous." *Id.* at 993-94.

Coe is dispositive of this issue. In *Coe*, the jury was similarly told that to impose the death sentence its verdict must be unanimous. *See Coe*, 161 F.3d at 337. This court held:

> We find that the instructions challenged by Coe do not violate Mills. Their language requires unanimity as to the results of the weighing, but this is a far different matter than requiring unanimity as to the presence of a mitigating factor. Nothing in this language could reasonably be taken to require unanimity as to the presence of a mitigating factor. The instructions say clearly and correctly that in order to obtain a unanimous verdict, each juror must conclude that the mitigators do not outweigh the aggravators.

Coe, 161 F.3d at 338. The same can be said of the instructions in the instant case. No statement therein can be said to require unanimity as to the presence of a mitigating factor. Indeed, Petitioner merely argues that the proximity of the terms "unanimous" and "mitigating circumstances" could have led the jury to misinterpret their obligation. This is not enough to create a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence.[7]

B. Petitioner's Cross-Appeal Challenging the Denial of his Petition for the Writ of Habeas Corpus as to his Conviction

On cross-appeal, Petitioner argues that the district court's conclusion that he suffered no prejudice from his trial counsel's deficient performance at the guilt stage was erroneous. First, Petitioner argues that due to his trial counsel's conflict of interest and wholly inadequate representation,[8] prejudice can be presumed and therefore need not be shown. Second, Petitioner argues that he did in fact suffer prejudice by trial counsel's delay in preparing for his trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history. In response, the State argues that there was no actual conflict of interest and that Petitioner suffered no prejudice

[7] Additionally, as the district court found, there was no mitigating evidence presented that the jury would have been precluded from properly considering even if the instructions were misinterpreted to require unanimity as to the existence of a mitigating factor.

[8] Petitioner argues that he is entitled to habeas relief on his conviction due to his trial counsel's inadequate performance without having to show prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), and *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). However, Petitioner points to no facts supporting a claim of wholly inadequate representation.

because he cannot show a reasonable probability that the result of the proceeding would have been different in the absence of trial counsel's deficient performance.

The prejudice prong of *Strickland* relating to ineffectiveness of counsel at the guilt phase asks "the question . . . whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. As stated above, the prejudice prong of *Strickland* is a mixed question of law and fact subject to de novo review. *See id.* at 698. Petitioner's claims must be evaluated keeping in mind the compelling incriminating testimony of both Miller and Norman. Additionally, Petitioner confessed to the crime at the sentencing stage. *See Abdur'Rahman*, 990 F.Supp at 1086.

1. Conflict of Interest

Petitioner argues that he need not show any prejudice as defined by *Strickland* because under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain [habeas] relief." *Id.* at 349-50. Petitioner argues that the third-party fee arrangement created a conflict of interest for his trial counsel because Boyd, the source of payment, was involved in the crime due to having allegedly supplied the shotgun used by Petitioner. However, the next sentence in *Cuyler* is dispositive of Petitioner's claim. *Cuyler* strictly requires that "until a defendant shows that his counsel actively represented conflicting interests, he has not established a claim of ineffective assistance. . . . [T]he possibility of conflict is insufficient to impugn a conviction." *Id.* at 350.

Petitioner fails to show that his trial counsel was actively representing conflicting interests. At most, Petitioner's trial counsel delayed the preparation of his case for too long in anticipation of receiving the balance of his retainer fee. Though Petitioner argues that he was adversely affected by the conflict of interest, he does not allege that his trial counsel was actively representing conflicting interests. Additionally, Petitioner could not make such a showing because as the district court noted, "even if Mr. Boyd's interests were

adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing." *Abdur'Rahman*, 999 F.Supp. at 1091. The district court noted that Barrett elicited testimony about the SEGM from Beard on cross-examination, mentioned the Petitioner's connection with the group during his closing argument, and issued subpoenas for Boyd and Beard to appear at the trial. Thus, it cannot be said that Barrett was actively representing conflicting interests.

Petitioner's reliance upon *Wood v. Georgia*, 450 U.S. 261 (1981), is misplaced. *Wood* involved an Equal Protection challenge to the imprisonment of three probationers because of their inability to make installment payments on fines. The Court did not resolve this issue because it remanded for a determination of whether a conflict of interest existed within a third-party payor arrangement. The probationers were three employees of an adult movie theater and bookstore who had been convicted of distributing obscene materials. As pointed out by Petitioner, the Court noted that "'[a] conflict of interest inheres in every such situation [a criminal defendant being represented by a lawyer hired and paid by a third party] . . . It is inherently wrong to represent both the employer and the employee . . . it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony." *Id.* at 271 n.15.

Unlike the instant case, in *Wood* the attorney was representing both the employer and the employees: "[s]ince it was this decision [not to pay the fines] by the employer that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer and has been paid by the employer, the risk of conflict of interest in this situation is evident." *Id.* at 267. Additionally, the statement from *Wood* upon which Petitioner so heavily relies was contained in a footnote to that opinion and was not the basis of the Court's decision to remand for an evidentiary hearing to determine whether a conflict of interest existed. Instead, the Court stated that "[o]n the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him."

Id. at 272. In the instant appeal, the record below does not compel the same conclusion. Given the district court's conclusion that Barrett did not protect the interests of Boyd or the SEGM, Petitioner cannot show that Barrett was actively representing conflicting interests and that he is therefore not entitled to a presumption of prejudice at the guilt stage.

2. Prejudice

Petitioner argues that the district court erred in concluding that he did not suffer any prejudice by his trial counsel's deficient performance of delaying his preparation for trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history.

First, Petitioner argues that Barrett's decision not to work on the case until he received the balance of the retainer prejudiced him by the lack of any meaningful work being performed and by depriving him of representation during his psychological evaluation. However, Petitioner points to no specific evidence that would raise a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt in the absence of this delay.

Second, Petitioner argues that he was prejudiced by his trial counsel's failure to investigate and present a lab report showing that no blood was found on the clothes he was allegedly wearing during the offense. The district court correctly held that such evidence would not have created a reasonable doubt about guilt because although there was testimony that Petitioner was wearing a long dark coat on the night of the offense, there was no evidence that at the time of the homicide Petitioner was wearing the clothes seized later from his apartment. *See Abdur'Rahman*, 999 F.Supp. at 1096.

Finally, Petitioner argues that trial counsel's failure to investigate his mental history, especially his diagnoses of Post-Traumatic Stress Disorder and Borderline Personality Disorder, prejudiced him at the guilt stage of his trial. The district court held that this was not prejudicial because there was no evidence that Petitioner could have produced an expert to testify that he was insane at the time of the stabbings, or even if one did so testify that testimony would have been effectively countered by evidence from the Middle

Tennessee Mental Health Institute from an examination authorized prior to trial that there was no basis for Petitioner to invoke an insanity defense. A review of this MTMHI document shows that it would be compelling evidence against any insanity defense. Thus, Petitioner cannot show that there is a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt if his trial counsel had investigated and presented evidence of his mental history.

The district court did not err in concluding that Petitioner suffered no prejudice at the guilt stage due to his counsel's deficient performance.

III. CONCLUSION

The district court's finding of prejudice at the sentencing stage is REVERSED and the judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence is VACATED. The district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED.

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge, concurring. The habeas court in this case believed that it had essentially unlimited discretion to conduct an evidentiary hearing on the petitioner's ineffective assistance of counsel claim. Such discretion is, however, an artifact of a bygone era. As this court recognized in *Mitchell v. Rees*, the modern Supreme Court has substantially pared back the ability of federal courts to retry cases already tried in the state courts. I would therefore hold that the district court in this case improvidently granted the petitioner an evidentiary hearing. I concur in all other parts of Judge Siler's opinion.

I

In 1963, the Supreme Court invested federal habeas courts with broad discretion in most aspects of collateral review of state criminal judgments. Contending that the common law conceived of the Great Writ as a remedy available for any kind of governmental detention contrary to fundamental law, the Court in *Fay v. Noia* declared that "federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in . . . state court proceedings." *Fay*, 372 U.S.

391, 426 (1963). This broad conception led the Court to hold that even a petitioner who had procedurally defaulted his claims in state court could obtain habeas relief, subject to the district court's "discretion" to deny relief when the orderly procedure of the state courts had been deliberately bypassed. *Id.* at 434, 438. In parallel fashion, the Court empowered federal habeas courts to conduct evidentiary hearings even when a petitioner had failed to develop the facts in state court proceedings. "In every case," the Supreme Court wrote in *Townsend v. Sain*, the district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." *Townsend*, 372 U.S. 293, 318 (1963). *Townsend* limited the discretion of habeas courts in this regard only by requiring that evidentiary hearings be held under six circumstances that would call into question the integrity of state court factfinding. *Id.* at 313.

The generation following *Fay* and *Townsend* has witnessed a sea-change in the law of habeas corpus. This change has been spurred by an increased attentiveness to considerations of comity and the values of "our federal system." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The idealistic predictions of *Fay* and *Townsend* that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, would not employ their discretion to subvert the integrity of state criminal justice, had been proven wrong. *Townsend*, 372 U.S. at 318; *see also Fay*, 372 U.S. at 433 (suggesting that the plenary power of inquiry on federal habeas corpus would not create incentives for defendants to withhold claims in state proceedings). The law reviews and the popular press echoed with calls for the unelected federal judiciary to desist from frustrating the outcomes of democratic process, particularly in capital cases. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L.Rev 333 (1998) (tracing the history of the countermajoritarian difficulty); *see also* Thomas Goldsmith, *Activists Want Nixon Impeached: Group Takes Message to Centennial Park*, The Tennessean, Mar. 26, 2000, at 1B (noting current calls for the impeachment of a

federal district court judge on the ground that his personal bias against the death penalty makes him unfit to hear cases in which it is a factor). *Fay* was overruled. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

Recognizing that in a federal system, the States should have the first opportunity to address and correct violations of state prisoners' federal rights, and that *Fay* had undervalued the important interests served by state procedural rules, the Supreme Court replaced *Fay*'s "deliberate bypass" standard with a cause-and-prejudice inquiry. *Coleman*, 501 U.S. at 731, 750. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is *barred* unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750 (emphasis supplied). In view of the significant harm suffered by States when federal courts failed to respect state procedural rules, federal court "discretion" to consider a habeas petitioner's federal claims was inappropriate when the petitioner had deprived the state courts of an opportunity to address those claims in the first instance.

Townsend's holding with respect to evidentiary hearings, too, was overruled. Just as a district court had no discretion to consider federal claims that a habeas petitioner had not submitted to the state courts, neither could it have discretion to allow a petitioner to develop facts that had not been fairly presented to the state courts. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992) (stating that it is "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim"). Thus, in *Keeney v. Tamayo-Reyes*, the Supreme Court applied the cause-and-prejudice standard to determine whether a state prisoner who had failed to develop material facts in state court was entitled to an evidentiary hearing on habeas corpus. *Id.* at 11.

Keeney was a case in which a petitioner sought a federal evidentiary hearing but did not receive one. *See id.* at 4.

Taking his cue from this fact, Judge Siler interprets *Keeney* to mean that a showing of cause and prejudice *requires* a habeas court to conduct an evidentiary hearing, but that even in the absence of such a showing, the court retains discretion to hold a hearing. *See ante* at __. In my view, neither the language nor the reasoning of *Keeney* will support this interpretation. In addition, the Supreme Court's recent pronouncements in *Williams v. Taylor*, 120 S. Ct. 1479 (2000), strongly corroborate a reading of *Keeney* that limits the authority of habeas courts to order evidentiary hearings.

The *Keeney* Court granted certiorari to decide "the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings." *Keeney*, 504 U.S. at 5. Ultimately, the Court determined that "the 'cause-and-prejudice' standard embodies the correct accommodation between the competing concerns implicated in a federal court's habeas power." *Id.* at 7. As a purely textual matter, nothing in the Court's framing of the question, or in its resolution of that question, suggests that the Court was restricting its holding to those circumstances in which a habeas petitioner is "entitled" to an evidentiary hearing.

More importantly, the logic that the Court followed to arrive at the cause-and-prejudice standard will not admit of such a construction. The Court based its holding on a quintet of values embedded in our federal system: comity, finality, judicial economy, channeling of claims to the appropriate forum, and uniformity in the law of habeas corpus. *Id.* at 8-10. It is difficult to understand how any of these values would be served by a system that entitled state prisoners to evidentiary hearings only upon a showing of cause and prejudice, but nevertheless invested the habeas courts with bottomless discretion to order hearings where they are not required. Such a system still would deny the States the opportunity to correct their own constitutional errors, would multiply the opportunities to relitigate convictions, and would consume scarce judicial resources.

Of particular concern is the disruption to the values of proper forum allocation and uniformity that would attend survival of the *Townsend* doctrine. The Supreme Court likened the former value to the requirement of exhaustion,

noting: "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Id.* at 10. A doctrine that allows a habeas court to conduct an evidentiary hearing where the petitioner has, without cause, failed to develop facts in state court re-engineers this two-way street into a blind alley. Even though the state court is the appropriate forum for resolution of factual questions in the first instance, *Townsend* creates "incentives for the deferral of factfinding to later federal court proceedings"—which can only "degrade the accuracy and efficiency of judicial proceedings." *Id.* at 9.

Similarly, the *Keeney* Court rested its holding on a symmetry between the jurisprudence of procedural default and that governing factfinding in the habeas courts. "There is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated," wrote the Court. "And little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum." *Id.* at 10. A dogged fidelity to *Townsend* disrupts this symmetry. Absent a showing of cause and prejudice, a habeas court would have no discretion to entertain a claim that had been procedurally defaulted in state court, but would have discretion to conduct an evidentiary hearing on a claim raised but insufficiently developed in state court, even where the petitioner did not show cause and prejudice for his failure to develop the factual record in the state court. Given the importance that the *Keeney* Court ascribed to uniformity in the law of habeas corpus, that cannot be a correct reading of the case.

This Court has recognized that *Keeney* implicitly withdrew the discretion that *Townsend* had granted. In *Mitchell v. Rees*,[1] we reversed a district court for ordering an

[1]To the extent that *Mitchell* suggested that a district court is without authority to hold an evidentiary hearing without first finding that one of the factors listed in 28 U.S.C. § 2254(d) applies, I agree with Judge Siler that its statement is "overbroad". *See Keeney*, 504 U.S. at 1720 n.5 (noting that § 2254(d) "indicates no

evidentiary hearing on a habeas petitioner's *Batson* challenge without requiring the petitioner to establish either (1) cause and prejudice for his failure to adequately develop the material facts in the state court proceedings, or (2) that not holding an evidentiary hearing would result in a fundamental miscarriage of justice. *Mitchell*, 114 F.3d 571, 579 (6th Cir. 1997). "[A] district court abuses its discretion," we said, "by ordering such a hearing without first requiring the petitioner to make the requisite showing." *Id.* at 577. We have been joined in this understanding by at least one other Circuit. *See Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992).

Our understanding is buttressed by a case decided by the Supreme Court just this Term, *Williams v. Taylor*. In *Williams*, the Court interpreted 28 U.S.C. § 2254(e)(2), a statute enacted four years after the decision in *Keeney*. Section 2254(e)(2) provides: "If the [habeas] applicant has failed to develop the factual basis of a claim in State court proceedings, the court *shall not* hold an evidentiary hearing on the claim unless the applicant" satisfies certain conditions. 28 U.S.C. § 2254(e)(2) (emphasis supplied). In deciding the level of fault connoted by the term "fail", the Court determined that the opening clause of § 2254(e)(2) is essentially a codification of the holding in *Keeney*: "Congress intended to preserve at least one aspect of *Keeney*'s holding: prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams*, 120 S.Ct. at 1489. As this language suggests, the Supreme Court itself does not read *Keeney* as deciding when a petitioner is *entitled* to an evidentiary hearing; rather, the case sets forth what a petitioner must do in order to obtain one. *See also id.* at 1488 ("We required the prisoner [in *Keeney*] to demonstrate cause and prejudice excusing the default before he *could* receive a hearing on his claim . . . ." (emphasis supplied)).

Keeney, *Mitchell*, and *Williams* thus command that a petitioner who has not developed facts in state court must

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assumption that the presence or absence of any of the statutory exception will determine whether a hearing is held").

justify his failure to do so through a showing of cause and prejudice before he may present those facts to a federal habeas court.

II

In Tennessee's post-conviction courts, petitioner Abdur'Rahman claimed that his trial counsel had rendered ineffective assistance by failing to investigate his mental health and criminal histories sufficiently to paint a sympathetic picture of his abusive childhood and resulting serious mental illness at sentencing. The state court conducted an evidentiary hearing, at which it considered the testimony of one Dr. Barry Nurcombe; Abdur'Rahman's school, military, and prison records; the transcript of a previous trial; records of the Middle Tennessee Mental Health Institute; records of social services departments; the affidavit of Mark Jones, Abdur'Rahman's brother; and a great deal of other evidence. At the conclusion of the hearing, the court held that Abdur'Rahman's trial counsel had been constitutionally deficient—reasonable attorneys would have investigated the accused's mental health and criminal histories. The court concluded, however, that counsel's faulty performance did not prejudice Abdur'Rahman. The evidence introduced at the hearing, the court noted, contained extensive documentation that Abdur'Rahman had had a past of profound violence, but no serious mental illness. Deciding that this information "looks like a mine field for any trial attorney to tiptoe through," the court denied post-conviction relief.

In his petition for federal habeas relief, Abdur'Rahman renewed his contention that trial counsels' deficient performance at sentencing had resulted in prejudice. Over the State's objection, the district court conducted an evidentiary hearing on the ineffective assistance claim. Although the State confronted the district court with *Mitchell*, the court cited an unpublished district court order for the proposition that the granting of an evidentiary hearing is discretionary. The district court proceeded to consider a significant volume of evidence, including the testimony of seven live witnesses, that was not presented to the state courts. Largely on the basis of this evidence, the district court concluded that

Abdur'Rahman had been prejudiced because his trial attorneys could have shown such mitigating circumstances as childhood abuse, serious mental illness, and the defendant's good qualities.

In doing so, the district court erred. Upon authority of *Keeney* and *Mitchell*, the district court could not order an evidentiary hearing until Abdur'Rahman showed cause for his failure to develop the factual record fully in the state courts. Ordinarily we would vacate the order partially granting the writ of habeas corpus and the order for the evidentiary hearing, *Mitchell*, 114 F.3d at 579, and remand the matter to the district court to afford Abdur'Rahman the opportunity to bring forward evidence establishing cause and prejudice, *Kenney v. Tamayo-Reyes*, 504 U.S. at 11. In this case, however, such a disposition is unnecessary; the evidence that Abdur'Rahman adduced at the federal evidentiary hearing is plainly insufficient to undermine confidence in the jury's sentence. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). As Judge Siler points out, the additional evidence presented to the habeas court merely supplemented the factual findings made by the post-conviction trial court. What the state court said in 1995 holds true today: "It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the face of a prior murder conviction which is added to two additional aggravating circumstances including the heinousness of the killing." I therefore concur that the order granting the writ as to Abdur'Rahman's death sentence should be reversed.

CONCURRING IN PART, DISSENTING IN PART

R. GUY COLE, JR., Circuit Judge, concurring in part, dissenting in part. Because I would affirm the district court's determination that Abdur'Rahman's counsel was constitutionally ineffective at sentencing and that the writ should be granted as to this issue, I respectfully dissent from that portion of Judge Siler's opinion.

As an initial matter, I agree with Judge Siler that the district court properly ordered an evidentiary hearing, under its discretion to do so, and properly considered the evidence presented at this hearing. I also note that the concurrence's

invocation of the bugaboo of overreaching federal courts does not reflect the reality of federal habeas review. *See* 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 482 (1990) (reporting that, in 1987 and 1988, only 1.1% of habeas corpus petitioners received a full hearing at the district court).

Abdur'Rahman's counsel was constitutionally ineffective at sentencing due to counsel's utter failure to investigate or present available mitigating evidence. In order to prove ineffective assistance of counsel, Abdur'Rahman must fulfill the familiar two-prong requirement of *Strickland v. Washington*, 466 U.S. 668 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. As noted by the majority, we review this mixed question of law and fact de novo. *See id.* at 698; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996).

The district court and both Tennessee post-conviction courts that examined this case determined that Abdur'Rahman's counsel's performance was deficient. The state does not challenge this determination. I survey counsel's deficiencies here because I believe that they help illuminate why Abdur'Rahman's sentence of death "resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Counsel's performance, as it related to preparation for and presentation at the sentencing hearing, was constitutionally inadequate. "[W]hen a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation." *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999); *see Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995) (stating that defense counsel was obligated to investigate mitigating

mental health evidence for sentencing). Counsel failed to ask the trial court to declare Abdur'Rahman[1] indigent or to ask the court for funds for investigation or experts; failed to hire an independent mental health expert; failed to investigate the nature of Abdur'Rahman's prior convictions; failed to contact and present available witness testimony from Abdur'Rahman's family at sentencing; failed to investigate Abdur'Rahman's numerous mental health records or educational, military, and prison records; and failed to inquire about Tennessee records regarding Abdur'Rahman's mental health or background or introduce evidence from these at his sentencing hearing. In sum, counsel completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence.

The majority suggests that, armed with this evidence, defense counsel could have made a legitimate tactical decision not to present the evidence, which is now in the record but was not presented to the jury, and that we should defer to this decision. Unfortunately, defense counsel's "tactical decision" in this case was to not prepare for the capital sentencing hearing of their client. "[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

Further, and more importantly, I disagree with the majority's finding that Abdur'Rahman was not prejudiced by counsel's failure. To demonstrate prejudice, Abdur'Rahman "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. He need not show that counsel's performance more likely than not affected the outcome of the case. *See id.* at 693-94. Instead, "[w]hen a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the

[1]I use Abdur'Rahman's present name throughout when referring to him, even in the context of events that occurred or documents created when the petitioner went by the name of Jones.

errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 696.

Counsel's failure to investigate or properly prepare for sentencing resulted in the presentation of essentially no mitigating evidence to the jury at the sentencing phase. Despite counsel's assertion in his opening statement that he would put on other witnesses, Abdur'Rahman and his wife were the sole witnesses at sentencing and their testimony related to the circumstances of the offense for which he was found guilty. It did not address Abdur'Rahman's history of abuse, his mental health treatment, or other relevant aspects of his life. This is so despite the fact that the jury should "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original)).

Although the jury found three aggravating factors at sentencing, it had nothing to weigh this information against; it is unsurprising that comparing those three factors with the dearth of mitigating evidence that the jury chose to impose a death sentence on Abdur'Rahman. However, "[t]he Eighth Amendment requires a jury to consider the circumstances of the crime and the defendant's background and character during the sentencing phase of a capital trial." *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). The jury's failure to consider mitigating evidence "risks erroneous imposition of the death sentence." *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) (quoting *Eddings v. Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring)).

Unbeknownst to the jury determining Abdur'Rahman's fate, mitigating evidence existed and was available for presentation at his sentencing hearing. If counsel had performed adequately, the jury could have learned that that Abdur' Rahman has a history of traumatic abuse as a child, that he had a long history of mental health problems and

treatments, and, finally, that Abdur'Rahman had previously been a productive member of society.

The abuse suffered as a child by Abdur'Rahman, mostly at the hands of his father, a military policeman, was inhumane and shocking.[2] Dr. Raymond Winbush, who testified before the district court, stated that Abdur'Rahman's "is singularly the worst case of abuse I have come across in 25 years being an academic psychologist . . . I can't even in my memory remember anything that remotely comes close to some of the things I read."

This abuse was attested to by the petitioner, the petitioner's half-sister, who was not contacted by counsel but

[2] As the district court stated:

> During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.
>
> Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. Petitioner's mother later married Petitioner's father, James Jones, Sr. Three more children were born of that marriage – James (Petitioner), Mark, and Sylvia.
>
> Petitioner's statements to mental health providers [over the course of his life] provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury.

Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1097-98 (M.D. Tenn. 1998) (footnote and citations to record omitted).

was available to testify, and the petitioner's brother, Mark Jones, who likewise was not contacted by counsel but stated in an affidavit that he would have been willing to testify at trial.[3] This abuse, while not a justification for petitioner's criminal conduct, is relevant, mitigating evidence that should have been presented to the jury.

Abdur'Rahman had a persistent history of psychiatric disorders and mental health problems. A "defendant[] who commit[s] criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). The mental health of the defendant has consistently been determined to be relevant, probative information to which the jury is entitled when making a life or death decision. *See, e.g., Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (finding that the petitioner was prejudiced by counsel's failure to investigate and present mitigating evidence at sentencing); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). The jury, however, heard nothing at sentencing regarding Abdur'Rahman's mental health history.

In the record before us, we have the testimony of Dr. Samuel Craddock, who was part of the team that diagnosed Abdur'Rahman for the state of Tennessee for purposes of competency to stand trial and a potential insanity defense without knowledge of his history of mental illness. Craddock testified that Thorazine and Prolixin, the medications prescribed for Abdur'Rahman in prison, were powerful anti-psychotic medications which raised a question of whether he was mentally ill, and that the symptoms exhibited by Abdur'Rahman were like those of someone with a borderline personality disorder. Dr. Diana McCoy testified that she diagnosed Abdur'Rahman with post-tramatic stress disorder and a possible borderline personality disorder. Dr. Robert Sadoff offered a similar diagnosis as McCoy.

Included in the records before this court are a department of social services report from the state of Washington stating

[3] Petitioner's brother subsequently committed suicide.

that Abdur'Rahman had a "paranoid personality" and "personality pattern disorder;" Philadelphia school records which include a request for psychiatric services; and prison records, including psychiatric examinations, some which state that Abdur'Rahman does not have a mental illness or psychosis, but does have a history of documented suicide attempts, and some which indicate that Abdur'Rahman was diagnosed with other disorders, including a severe psychopathic personality and a "psychotic depressive reaction and antisocial personality." Abdur'Rahman's prison records also indicate that Abdur'Rahman was frequently and heavily medicated during at least some of his time in prison and that he beat his head against the wall while in prison. Records from the New Jersey Department of Human Services document his 1967 stay while a youth at the Trenton Psychiatric Hospital, where he was diagnosed with a sociopathic personality disturbance and antisocial reaction with depression, and records from the Davidson County Sheriff's Department show that Abdur'Rahman beat his head against a wall after his arrest there. Further, the record indicates that others in Abdur'Rahman's family had mental health problems. Many of these records were available to defense counsel through the MTMHI report, prepared for the purpose of determining Abdur'Rahman's competence to stand trial;[4] however, counsel failed to investigate or present any of this mitigating information to the jury. Nor did counsel present to the jury a mental health expert who could have testified regarding Abdur'Rahman's mental health problems.

Further, testimony from the trial of Abdur'Rahman's conviction for second-degree murder for the killing of a fellow inmate – a conviction that supported one of the aggravating circumstances – indicated, in the opinion of one expert, that Abdur'Rahman had a borderline personality disorder and schizoid personality. This evidence could have

[4]The fact that Abdur'Rahman was found competent to stand trial does not, of course, alter the fact that his mental health problems should be considered by the jury at sentencing. *See Blano v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

been mitigating with respect to the petitioner's mental health, as well as with respect to the prior murder.

Abdur'Rahman's wife could have her personal observations about his mental health, including the fact that her husband had conversations with people who did not exist, banged his head against the wall, and believed that the couple would give birth to the next Messiah. She also stated that she told defense counsel that a psychiatrist should examine her husband.

Despite his childhood abuse and extensive mental health history, Abdur'Rahman was able to comport his conduct to societal norms and to engage in productive activities. His former fiancé, about whom he informed defense counsel, but whom counsel failed to contact, later testified that, when she knew him in 1983, Abdur'Rahman held a steady job, attended college, and volunteered with a Quaker youth group at a large housing project. She stated that the petitioner was a caring and gentle person who sincerely held Christian beliefs.

While acknowledging that some of this evidence would have been mitigating, the majority adopts the rationale of the state court of appeals that the evidence that defense counsel failed to investigate or present also contained instances of violent conduct and anti-social actions by Abdur'Rahman. This treatment of the evidence by the majority contradicts the emphasis by the courts that evidence considered mitigating by the person facing a death sentence should be allowed to the greatest extent possible to insure a full and fair determination by the jury. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Further, the majority overlooks that the jury already had much of this evidence of violent or prior criminal conduct before it and that the presentation of available, relevant evidence at sentencing would not have subjected Abdur' Rahman to additional statutory aggravating factors. The mitigating elements of this evidence would have served, instead, to present the jury with an accurate and complete picture of the person they were sentencing – the very purpose of a capital sentencing hearing. In addition, the majority ignores the mitigating potential of nearly all of the available evidence and the fact that some of the evidence that counsel failed to investigate or present does not involve violence or

harmful behavior by Abdur'Rahman. *See Williams v. Taylor*, 120 S. Ct. 1495, 1514 (2000) (noting that the presence of unfavorable records did not justify "the failure to introduce the comparatively voluminous amount of evidence that did speak in [petitioner's] favor").

Had counsel adequately performed, the jury weighing whether a death sentence was an appropriate punishment for Abdur'Rahman would have had a representative picture of the person they were sentencing, instead of the one-sided account upon which they based their decision. Like the petitioner recently before the Supreme Court, Abdur'Rahman has "a constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams*, 120 S. Ct. at 1513. Given the total lack of mitigating evidence presented at Abdur'Rahman's sentencing hearing, "counsel's conduct so undermined the proper functioning of the adversarial process that the [sentencing hearing] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *see also Austin*, 126 F.3d at 848; *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1996). I respectfully dissent.

98-6568/6569

FILED

DEC 2 2 2000

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR'RAHMAN,

Petitioner-Appellee/Cross-Appellant,

v.

RICKY BELL, WARDEN,

Respondent-Appellant/Cross-Appellee.

ORDER

BEFORE: SILER, BATCHELDER, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Cole would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

RECEIVED
OCT 10 2001
LEONARD GREEN, Clerk

FILED
OCT 10 2001
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR' RAHMAN, formerly known as JAMES JONES,	)	
Appellee/ Cross- Appellant	)	
vs.	)	**Nos. 98-6568, 98-6569**
RICKY BELL, Warden,	)	**CAPITAL HABEAS CORPUS**
Appellant/ Cross-Appellee	)	

APPELLEE ABU-ALI ABDUR'RAHMAN'S MOTION TO WITHHOLD THE MANDATE AND GRANT REHEARING *EN BANC* OR REMAND FOR FURTHER PROCEEDINGS

Earlier today, the Supreme Court of the United States denied the Petition for a Writ of Certiorari filed by Appellee Abu-Ali Abdur'Rahman ("Appellee") to review this Court's judgment in this case. Accordingly, Appellee respectfully moves this Court for an Order withholding its mandate and directing either that the case will be reheard *en banc* or that the case will be remanded to the district court for further proceedings. This Court's authority to issue such an Order in light of the highly unusual intervening circumstances present in this case is clear. *Compare First Gibraltar Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995) (granting

rehearing, vacating judgment, and reaching different result after denial of certiorari based on intervening circumstances), *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989) (same), and *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977) (same) *with Nyyssonen v. Bendix Corp.*, 356 F.2d 193, 193 (1st Cir.), *cert. denied,* 385 U.S. 846 (1966) (denying leave to file motion for rehearing after denial of certiorari when motion "contains nothing of substance that could not have been asserted in a timely motion in response to our original opinion").

Specifically, this Motion rests on five distinct intervening developments that have occurred since this Court last considered this case: (i) intervening decisions of this Court that create a conflict with the decision in this case that can only be resolved *en banc*; (ii) the State's express argument to the Supreme Court, in opposition to Appellee's Petition for a Writ of Certiorari, that the patent inconsistencies between the panel opinion in this case and other Sixth Circuit precedent "should be resolved *by the Sixth Circuit* and not by a grant of certiorari" (emphasis added); (iii) an intervening decision of the U.S. Supreme Court with which the panel opinion in this case conflicts; (iv) the State's concession that the panel opinion in this case was simply wrong in a critical respect; and (v) an important intervening procedural Order of the Tennessee Supreme Court. Particularly given that this Court's previous Order denying rehearing *en banc*

strongly suggests that the Court was narrowly divided at that time, Appellee's counsel file this Motion based on a sincere, good faith belief that these five intervening developments, alone or in combination, will lead the full Court to reconsider the case.

The relevant events relating to the issuance of the mandate in this case are as follows. On September 13, 2000, a divided panel of this Court entered its opinion reinstating Appellee's death sentence. 226 F.3d 696 (reversing the district court's decision, which is published at 999 F. Supp. 1073). On January 9 and 11, 2001, the panel entered a stay of mandate pending the filing and disposition of a Petition for a Writ of Certiorari. Appellee subsequently filed his Petition. Today, the Supreme Court denied the Petition.[1]

The Clerk of the Supreme Court will provide a certified copy of the Supreme Court's Order to this Court. *See* S. Ct. R. 45.3. Absent a further Order of this Court, this Court's current stay of mandate (which is in place pending the filing and disposition of Appellee's Petition for a Writ of Certiorari) will then expire. *See* Fed. R. App. P. 41(d)(2). This Court, however, has the broad power to issue a distinct stay pending Appellee's further request for rehearing *en banc* and to grant rehearing subsequent to the denial of certiorari. *See* Fed. R. App. P. 41(d)(1);

[1] The Supreme Court also denied a motion by the State to strike the discussion by an *amicus curiae* of affidavits sworn to by a majority of the trial jurors stating that they likely would *not* have voted to impose the death penalty had the available mitigation evidence been presented to them.

supra at 1-2 (collecting cases). For the reasons described in the Argument section below, this case presents extraordinary circumstances that merit withholding the mandate and granting *en banc* consideration, or at least remanding to the district court for further consideration.

BACKGROUND

I. State Court and District Court Proceedings.

The factual and procedural history of this case is described in Appellee's Petition for a Writ of Certiorari (*see* Appendix 1, *infra*) and can be summarized here briefly.[2] In 1987, a Tennessee jury convicted Appellee of murder and sentenced him to death. He properly exhausted appeals in the state system, including state post-conviction appeals. The state post-conviction courts found that Appellee's trial counsel had been ineffective in at least thirteen different instances, but concluded that Appellee had not been prejudiced as a result.

The United States District Court for the Middle District of Tennessee subsequently vacated Appellee's death sentence and remanded the case to the state courts for resentencing. After hearing extensive testimony and reviewing

[2] All of the briefs and pleadings filed with the Supreme Court at the certiorari stage are reproduced as Appendices to this Motion. Appellee's counsel respectfully suggest that this Court's consideration of this Motion will be aided greatly by a review of the certiorari filings.

numerous exhibits, the district court found that Appellee's trial counsel had been grievously ineffective in failing to introduce five different classes of mitigating evidence, as well as evidence mitigating the principal aggravating circumstance underlying the death penalty. The district court found the available mitigation evidence to be "very impress[ive]," "vivid," "significant," "extremely credible," "compelling," and "overwhelming." The district court found the failure of Appellee's trial counsel to provide this evidence to the sentencing jury to be "grave," "serious," "very significant," "substantial," "breathtaking[]," and "grievous."

The district court noted two facts that buttressed its holding that Appellee had been prejudiced at sentencing by the ineffective assistance of his counsel. First, under Tennessee law, the death penalty cannot be imposed if even a single juror votes for a life sentence. The district court was fully persuaded "that at least one juror would have voted for a life sentence rather than the death penalty." Second, in a quotation on which a panel majority of this Court would later rely heavily (albeit for the remarkable purpose of *reinstating* Appellee's death sentence, *see infra*), the district court found that "[t]his is a case of no mitigating evidence–none–being offered to the jury despite its availability and abundance."

II. Sixth Circuit Proceedings.

On the State's appeal, a panel of this Court (divided two-to-one) reversed and reinstated Appellee's death sentence. The State had *a single* theory on appeal, which a majority of the panel (Judges Siler and Cole) *rejected*: that the district court was forbidden from expanding the factual record on Appellee's ineffective assistance of counsel claim.[3]

A different majority (Judges Siler and Batchelder, over a lengthy dissent by Judge Cole), however, proceeded *sua sponte* to summarily reject the district court's extensive factual findings that Appellee had been prejudiced by the failure of his counsel to introduce the voluminous available mitigating evidence. The entirety of the majority's analysis was set forth in essentially two sentences: "While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Appellee's motive for killing a fellow prison inmate and a history of violent character traits." 226 F.3d at 708-09.

In reaching this conclusion, the majority did not cite any precedent permitting it to reach the prejudice issue *sua sponte*. Indeed, the majority did not

[3] In its appeal, the State never challenged the district court's finding that trial counsel's performance was constitutionally deficient. Furthermore, in its appeal the State never challenged the district court's determination that the full district court record supported a finding of prejudice and the granting of habeas relief.

even acknowledge that its holding rested upon a fact-bound argument that (i) the State had waived by not raising on appeal, (ii) the State still did not embrace when Appellee repeatedly pointed out the waiver, and (iii) no member of the panel even raised at oral argument.

The panel majority also did not discuss the district court's conclusion that at least a single juror likely would have found the mitigating evidence compelling. Nor did the majority acknowledge this Court's extensive precedent attributing special significance in the prejudice inquiry to the failure to introduce any mitigating evidence.

Judges Siler and Batchelder separately rejected Appellee's protective cross-appeal. Appellee maintained that he had been unconstitutionally sentenced to death based on a "heinous, atrocious, or cruel" ("HAC") instruction that this Court had held unconstitutionally vague in *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999), and *Houston v. Dutton*, 50 F.3d 381 (6th Cir.), *cert. denied*, 516 U.S. 905 (1995). The majority found that error harmless, however, because it concluded that Appellee would have been sentenced to death even if that aggravator had not been utilized, given the total failure of Appellee's trial counsel to introduce any mitigating evidence: "[I]n the instant case, as the district court found, '[t]his is a case of no mitigating evidence–none–being offered

to the jury despite its availability and abundance.'" 226 F.3d at 711 (citing the district court's decision, 999 F. Supp. at 1101).

In finding the use of the HAC aggravator to be harmless, the majority totally refused to consider the mitigation evidence introduced in the federal district court, concluding (erroneously, *see infra*) that Appellee had waived any such request. The majority did not explain on what basis the Court could deem Appellee's argument to be waived while simultaneously *sua sponte* reinstating Appellee's death sentence on an argument waived by the State.

Appellee sought rehearing and rehearing *en banc* on the ground that the panel majority's decision conflicted with a consistent line of Sixth Circuit precedent holding that arguments not raised on appeal are deemed waived. The Court called for a response, but denied rehearing *en banc* in an Order suggesting that the vote was narrowly divided. *See* Order of Dec. 22, 2000 ("less than a majority of the judges . . . favored the suggestion"). The Court did, however, stay its mandate pending the filing and disposition of a Petition for a Writ of Certiorari.

III. Supreme Court Proceedings.

Appellee filed a Petition for a Writ of Certiorari, supported by three sets of *amicus* briefs. A group of law professors – including Laurence Tribe and James Liebman – argued that certiorari should be granted because the panel majority

violated due process and basic principles of procedural regularity by (i) reinstating Appellee's death sentence based on an argument consciously waived by the State, and (ii) failing to give Appellee even the opportunity to submit briefing or oral argument on that issue. (*See* Appendix 4, hereto). The Cornell Death Penalty Project argued that certiorari should be granted because empirical evidence established that jurors would have been persuaded by the available mitigating evidence that Appellee's trial counsel failed to introduce. (*See* Appendix 5, hereto). Hence, Appellee had been prejudiced by the ineffective assistance of his trial counsel. Finally, a consortium of national and state mental health, social worker, and children's groups argued that certiorari should be granted because the panel majority misconstrued the available mitigating evidence, including particularly medical testimony regarding Appellee's mental health. (*See* Appendix 6, hereto).

In the Argument Section, *infra*, Appellee will discuss the substance of his grounds for seeking certiorari as they relate to this Motion. But the State's approach in opposing certiorari is itself a critical intervening development that merits discussion from the outset. The State's position was that, whatever manifest errors the panel majority's decision presented, they did not give rise to a clear *inter-circuit* conflict meriting Supreme Court review. For example, the State maintained that in reaching the question of prejudice *sua sponte*, the panel majority

had at most created "an intra-circuit conflict [that] *should be resolved by the Sixth Circuit* and not a grant of certiorari." St. Br. in Opp. 7 (Appendix 3, hereto) (emphasis added). The State also maintained that this case presented no circuit conflict regarding the relevance of a single juror's ability to hold out for a life sentence because the panel majority totally failed to say anything about that issue *at all*. *Id.* at 17. In response to Appellee's argument that other circuits would have found prejudice because Appellee's trial counsel had failed to introduced *any* mitigating evidence, the State took the position that the panel majority was *wrong* and that such evidence had in fact been introduced. *Id.* The State maintained that position notwithstanding that the panel majority, in addressing the HAC aggravator, had specifically relied on trial counsel's failure to introduce any evidence to *support* reinstating the death penalty.

ARGUMENT

In its current posture, this case is the subject of five intervening developments that, alone or in combination, plainly merit *en banc* consideration by this Court. At the very least, a remand to the district court is appropriate. Particularly given the ultimate finality of the death sentence *sua sponte* reinstated by the panel majority in this case, the full Court's careful consideration is warranted.

I. Intervening Decisions Of This Court Establish A Clear Conflict Between The Panel Majority's Decision And Sixth Circuit Precedent Holding That The Complete Failure To Introduce Mitigating Evidence Strongly Supports A Finding Of Constitutionally Ineffective Assistance Of Counsel.

The district court in this case attributed considerable significance to the fact that Appellee's trial counsel completely failed to introduce any mitigating evidence at sentencing. "This is a case of no mitigating evidence–none–being offered to the jury despite its availability and abundance." 999 F.Supp. at 1101. In effect, Appellee's trial counsel provided no reason at all to spare his life.

The panel majority relied on this finding of the district court, but for precisely the opposite reason. The majority invoked it not to support Appellee's claim of ineffective assistance of counsel, but rather reasoned that, although Appellee had been sentenced pursuant to a "heinous, atrocious, or cruel" aggravator that is unconstitutional under Sixth Circuit precedent, that error was harmless. 226 F.3d at 711. Specifically, the majority reasoned that, because Appellee's trial counsel had introduced no mitigating evidence, the jurors would have sentenced Appellee to death based on the remaining aggravators even if the HAC aggravator had not been utilized. In other words, the panel majority found the constitutional error harmless precisely *because* Appellee's counsel had provided no reason to save his life.

The panel majority's decision flatly conflicts with intervening decisions of this Court, and this intra-circuit conflict can only be resolved by *en banc* review. Intervening Sixth Circuit precedent establishes beyond peradventure that counsel's failure to introduce any mitigating evidence calls the death penalty seriously into question, directly contrary to the panel majority's reasoning that it *supports* reinstating a death sentence. Thus, in *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000), *cert. denied*, 2001 U.S.LEXIS 7348 (2001), a case that (like this one) involved trial counsel's failure to present psychiatric testimony in mitigation, the Court found prejudice. "[T]he jury that sentenced Skaggs to death did not have accurate information about the mental status of the person it was sentencing. If counsel had performed adequately, the jury would have had significant mitigating evidence to consider." Even more recently, this Court has emphasized its "many recent decisions vacating death sentences due to ineffective assistance," including particularly "based upon inadequate penalty phase preparation by trial counsel." *Greer v. Mitchell*, No. 98-4330, 2001 U.S. App. LEXIS 19599, at *22 n.2, **27-28 (6th Cir. Sept. 4, 2001). It is bitterly ironic that the *Greer* opinion cites as support for that line of precedent Judge Cole's *dissent* in this case. *Id.* at *22 n.2. *See also Cone v. Bell*, 243 F.3d 961, 977 (6th Cir. 2001) (failure to present evidence in mitigation is a clear "red flag").

Granting rehearing *en banc* on this question is supported by two further considerations. First, the State opposed certiorari in the Supreme Court on the ground that the panel majority was *wrong* when it agreed with the district court that Appellee's counsel introduced no mitigating evidence. *See* St. Br. in Opp. 17 (Appendix 3, hereto) ("[T]he record does not support petitioner's assertion that counsel wholly failed to introduce any mitigating evidence. Thus, contrary to petitioner's argument, this case does not squarely present the prejudice issue where the jury was provided with no reasons to spare petitioner's life."). It is fundamentally unfair to execute Appellee on two totally irreconcilable premises: (i) that the use of the unconstitutional HAC aggravator at Appellee's trial was harmless error because Appellee's counsel introduced no mitigating evidence; and (ii) that Appellee was not prejudiced by the concededly ineffective assistance of his counsel because that counsel did introduce mitigating evidence.[4]

Second, although not itself an intervening development, it remains the case that the panel majority's reasoning is fundamentally flawed because one of the two votes to reinstate the death penalty in this case is internally inconsistent and conflicts with Sixth Circuit precedent. Judge Batchelder joined Judge Siler in

[4] This was not the only instance in which the State sought to avoid certiorari on the perverse ground that the panel majority was wrong. Thus, the State argued that the HAC aggravator previously held unconstitutional by this Court is in fact constitutional under Supreme Court precedent. See St. Br. in Opp. 14 (Appendix 3, hereto).

holding that the use of the unconstitutional HAC aggravator was harmless. But in a separate concurrence, Judge Batchelder made clear that she agreed that Appellee had not been prejudiced by the ineffective assistance of his counsel because the jurors would inevitably have imposed the death penalty based on the remaining two aggravators, including particularly the *HAC aggravator*. "What the state court said in 1995 holds true today: 'It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the fact of a prior murder conviction which is added to two additional aggravating circumstances *including the heinousness of the killing*.'" 226 F.3d at 719 (emphasis added). Because that aggravator was unconstitutional under Sixth Circuit precedent, Judge Batchelder's reliance on that aggravator to determine that Appellee was not prejudiced by the ineffective assistance of his counsel presents a clear intra-circuit conflict meriting *en banc* review.[5]

[5] It also bears emphasizing that the state courts, in making an assessment of the evidence upon which Judge Batchelder relied, did not have the benefit of the extensive mitigation proof introduced in the federal district court. Particularly relevant here, the district court found that competent counsel would have proved to the jury that Appellee's "prior murder conviction" of a fellow prisoner was the result of his uncontrollable reaction to being assaulted and raped by a gang led by the victim.

II. *En Banc* Consideration Is Warranted Because Intervening Developments Demonstrate That The Panel Majority's Decision Conflicts With Sixth Circuit Precedent Holding That Fact-Bound Questions Not Raised On Appeal Are Waived, And Furthermore That The Panel Majority's Decision Rests On A Fundamental Misconception Regarding Appellee's Contentions On Appeal.

The panel majority in this case reversed the district court on a ground not raised by the State in its appeal. The State did not contest the district court's finding of prejudice based on the record developed in the district court. Appellee repeatedly pointed out the waiver, which the State did not dispute. *E.g.*, Appellee's Br. on Appeal 14; Trans. of Oral Arg. 11, 45. In the Supreme Court, the State maintained that this issue presented only "an intra-circuit conflict [that] should be resolved by the Sixth Circuit and not by a grant of certiorari." State Br. in Opp. 7 (Appendix 3, hereto).[6] Alternatively, the State maintained that the panel's decision was consistent with Sixth Circuit precedent holding that the Court may raise an issue *sua sponte* in order to avoid a fundamental miscarriage of justice. *Id.*

[6] This Court's precedent – which the panel majority failed to even acknowledge – is in accord with the rule applied by other circuits, which clearly would have declined to consider the prejudice issue – and therefore would have reached a result contrary to that of the panel majority in this case – because the State failed to raise the issue in its appeal. *See, e.g.*, *Rivera v. Dep't of Corrections*, 915 F.2d 280, 283 (7th Cir. 1990) (per Posner, J.) ("[T]he issues in habeas corpus as in other civil cases are framed by the parties, so that if the state waives its best arguments it must live with the consequences."); *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (per Easterbrook, J.) ("All arguments for reversal must appear in the opening brief, so that the appellee may address them. . . . Procedural rules apply to the government as well as to defendants."); *Demarest v. Price*, 130 F.3d 922, 942 n.9 (10th Cir. 1997); *Boardman v. Estelle*, 957 F.2d 1523, 1537 (9th Cir.) (per curiam), *cert. denied*, 506 U.S. 904 (1992).

The State cannot now avoid *en banc* review having argued in the Supreme Court that any conflict between the decision below and Sixth Circuit precedent should be resolved by this Court alone. Furthermore, intervening precedent establishes that the State was wrong to contend that the panel majority's decision could be reconciled with circuit precedent on the theory that this Court will decide an issue *sua sponte* to avoid a miscarriage of justice. In *Vance v. Spencer County Public School District*, 231 F.3d 253, 258 n.3 (6th Cir. 2000), the Court explained that it will address only those arguments raised on appeal. In *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 984 (6th Cir. 2000) (emphasis added), the Court explained that the exception to that rule is when the Court faces "*a pure question of law* that cries out for resolution." The panel majority's decision in this case, by contrast, addressed an entirely *fact-bound* question – *viz.*, whether the district court record established prejudice – not a question of law. It therefore is not surprising that the panel majority cited no authority at all – whether from the Sixth Circuit or any other court – explaining on what authority it reached the question of prejudice *sua sponte*.[7]

[7] No doubt, the panel majority's failure to even acknowledge that it was deciding the prejudice question *sua sponte* undermined Appellee's claim that the decision below created a circuit conflict meriting Supreme Court review. As noted in the text *supra*, the State opposed certiorari on the ground that this Court had not announced any principle of law at all, and thus had not announced any principle that could be said to conflict directly with the precedent of another circuit.

Even if the Court were in the future to recognize a broad "miscarriage of justice exception," the State has never explained what injustice would result from having Appellee resentenced in light of the mitigation proof that constitutionally adequate counsel would have introduced at Appellee's trial. Nor has the State explained why, even if the Court were to reach the issue of prejudice *sua sponte*, it would not give Appellee the opportunity at least to brief the question or present oral argument before resentencing him to death. To the contrary, all that has resulted is an exceedingly dangerous precedent that ought to be overturned post-haste by the *en banc* Court. This prejudice issue in this case, as in many death penalty cases, was heavily fact-bound and nuanced; to hold that the Court will decide it without any input from the parties is deeply troubling and a marked departure from the Court's otherwise consistent precedent.

There has also been an important intervening development with regard to the panel majority's fundamentally unjust, *one-sided* application of the waiver principle. Inexplicably, the majority reinstated petitioner's death sentence on an issue waived by the State but refused to consider an argument for sustaining the district court's judgment on the ground that the argument had been waived by Appellee. Specifically, in holding that the use of an unconstitutional HAC aggravator was harmless, the majority refused to consider the mitigating evidence

compiled by the district court on the ground that Appellee had waived any such argument.

The intervening development is the State's total failure in the Supreme Court to contest that the panel majority's decision both (i) was utterly and completely wrong to hold that Appellee had waived reliance on the district court record with respect to the HAC aggravator, and (ii) was inexplicable in its one-side application of the waiver rule. In his Petition for a Writ of Certiorari, Appellee specified in the strongest possible terms:

> The majority's assertion that petitioner's counsel had not requested that the Sixth Circuit consider the federal court record with respect to the HAC aggravator, Pet. App. 24a n.6, is totally false, and we specifically defy respondent to defend it. Petitioner expressly argued that "[t]he error was not harmless" in light of "the ineffective assistance of counsel that pervaded the sentencing hearing in this trial," and in the same sentence referred the court to a six-page single-spaced discussion of the mitigation evidence developed in the federal court. Pet'r C.A. Reply Br. 9-15 nn.6-7, 21. We also invite respondent to explain on what conceivable basis the Sixth Circuit could have been justified in reinstating petitioner's death sentence by *sua sponte* reaching the prejudice argument waived by the state while simultaneously purporting to hold that petitioner also must be sentenced to death because, although an unconstitutional instruction was used at petitioner's trial, that error was harmless because his counsel had *waived* on appeal a particular evidentiary argument.

Pet. for Cert. at 20-21 n.12 (Appendix 1, hereto) (emphasis in original). Despite this perfectly explicit challenge, the State said nothing at all in response, unable to provide a single sentence in defense of the panel majority's ruling. The State's

effective acknowledgment that this Court's order reinstating Appellee's death sentence was erroneous is a significant intervening event that justifies reconsideration.

III. *En Banc* Consideration Is Warranted Because The Panel Majority's Decision Conflicts With An Intervening Supreme Court Decision.

The panel majority in this case reinstated Appellee's death sentence based on its view of how the jury would have regarded the "balance" of aggravating and mitigating circumstances had it been presented with the available mitigating evidence. 226 F.3d 696, 707. The majority's approach thus contrasted starkly with the district court's view that a death sentence properly should be vacated if it is clear that, notwithstanding the balance of aggravating and mitigating circumstances, the jurors would have deemed the defendant insufficiently morally culpable for the murder.

Subsequent to the panel's decision, the Supreme Court made clear that the district court's approach was the correct one. In *Penry v. Johnson*, 121 S. Ct. 1910, 1920-21 (2001) ("*Penry II*"), the Court held that the Constitution requires that a capital sentencing jury be given the opportunity to reach a "reasoned moral response to [the mitigating and aggravating] evidence in rendering its sentencing decision." In this respect, the Court reaffirmed its conclusion in an earlier decision in the same case that the sentencing determination must account for our societal

view "'that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). To the same effect is the Supreme Court's recent pronouncement – not acknowledged by the panel majority in this case – that a death sentence properly is vacated based on substantial mitigating evidence "even if it *does not* undermine or rebut the prosecution's death-eligibility case." *Williams v. Taylor*, 529 U.S. 362, 398 (2000).

It is perfectly clear that if the panel majority had followed the standard for determining prejudice articulated in the Supreme Court's intervening decision in *Penry II*, it would have affirmed the district court's finding of prejudice. Of particular note, neither the State nor the panel majority expressed any doubt that the exceedingly graphic and compelling mitigating evidence found by the district court (but never even mentioned by the panel majority) demonstrated that Appellee was not sufficiently morally culpable to be put to death for his crime insofar as he had suffered vicious abuse, had a grossly dysfunctional upbringing, suffered from

serious mental illness, and had made substantial contributions to society.[8] For example, the district court found:

> Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit.

999 F. Supp. at 1098. The district court also found that Appellee "had a family history of serious mental conditions" – his sister attempted suicide on several occasions, while his brother committed suicide several days after his arrest for sexually and physically abusing his children – and that Appellee himself had been diagnosed as having a "paranoid" and "passive aggressive" personality and as being "very sick and in need of immediate commitment," "in serious need of therapy," and "highly disturbed." *Id.* at 1098 & n.33. Moreover, the district court found that, "despite his mental health problems," Appellee had "held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence." *Id.* at 1099. Finally, the district court found that the principal aggravating circumstance invoked by the prosecution to justify Appellee's death

[8] The district court's findings regarding this testimony are summarized in the Petition for Certiorari at 12-14 (Appendix 1, *infra*).

sentence – a prior homicide while in prison – was in reality Appellee's defensive reaction to being raped by a gang led by the victim. *Id.* at 1100.

IV. *En Banc* Consideration Is Warranted Because Intervening Developments Demonstrate That Appellee Was Seriously Prejudiced By The Panel Majority's Failure To Address The Significance Of A Single Juror's Ability To Hold Out For A Life Sentence.

En banc reconsideration also is appropriate in light of an intervening development regarding the panel majority's determination to reinstate Appellee's death sentence without addressing the relevance of the fact that, under Tennessee law, a single juror who was persuaded by mitigating evidence could require the imposition of a life sentence. The district court relied on that fact in finding that Appellee was prejudiced by the ineffective assistance of his counsel. Appellee's Petition for a Writ of Certiorari demonstrated that four circuits – the Third, Fifth, Seventh, and Eighth – have embraced the district court's approach, employing a more relaxed prejudice standard in cases arising from states with the same single-juror rule as Tennessee. *See* Pet. for Cert. at 25 & n.13 (Appendix 1, hereto). Appellee argued that certiorari should be granted because the panel majority, by rejecting the district court's finding of prejudice, brought the Sixth Circuit into conflict with those other courts of appeals.

The State opposed certiorari on this issue on only a single ground: "The court of appeals did not specifically address the potential effect of the omitted

evidence upon a single juror, and nothing in the opinion below suggests that the court either adopted or rejected petitioner's argument . . . ." State Br. in Opp. 17 (Appendix 3, hereto). In this respect, the State sought to avoid Supreme Court review on the ground that this Court's opinion effectively ignored an important issue of law that was critical to the case, and thereby could not be said to create a circuit conflict. (No doubt, the panel majority's failure to address the point arose from the fact that it reinstated Appellee's death sentence *sua sponte* without giving Appellee's counsel any opportunity to brief or argue the relevant legal principles.) Our justice system cannot, or at least should not, embrace judicial decision making of this sort when the death penalty is at stake. At the very least, *en banc* consideration should be granted so that this Court can determine if it should in fact reject the considered view of four other circuits and, if so, provide Appellee a fair and reasonable opportunity to seek review in the Supreme Court.

V. *En Banc* Consideration Is Warranted Because, On The Majority's Rationale, Appellee Is Entitled To The Benefit Of An Intervening Tennessee Supreme Court Order.

Finally, rehearing also should be granted in light of an intervening Order of the Tennessee Supreme Court providing that issues not presented in a discretionary application to that Court following an adverse decision of the Tennessee Court of Criminal Appeals shall be deemed exhausted. *See* Tenn. S. Ct. R. 39.[9]

[9] Tenn. S. Ct. R. 39 provides:

> "In all appeals from criminal convictions or post-conviction relief from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

Alternatively, this Court should modify its judgment to permit the district court to consider the effect of this Order.

The recent promulgation of Tenn. S. Ct. R. 39 is highly relevant to this case. The district court held that Appellee had failed to exhaust and had therefore procedurally defaulted a number of claims by failing to present them to the Tennessee Supreme Court in an application for discretionary review. The district court thus refused to consider a number of Appellee's claims of prosecutorial misconduct which, in fact, were properly exhausted according to Rule 39.[10] Appellee did not challenge that determination in this Court, principally because he

[10] These claims of prosecutorial misconduct include: whether the prosecution should have disclosed the statements of certain witnesses, the redacted portions of certain police reports, a memorandum in the prosecution's file concerning a bank account in the victim's name, the statement of the victim's brother together with lab reports about the victim, and information about Petitioner's bank account; whether the prosecution unconstitutionally influenced the co-defendant's testimony which was given as part of a plea bargain; whether the prosecution provided false information to the state mental health evaluators; whether the prosecution improperly manipulated the testimony of a key witness (in addition to the co-defendant); and whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's prior murder conviction. *See* 999 F. Supp. at 1082, n.8.

had prevailed in the district court, and also because substantial page limits constrained the number of points he could raise.

In light of the Tennessee Supreme Court's intervening enactment of Rule 39, it is clear that the district court's legal conclusion was erroneous. Because the comity interests underlying the district court's finding of procedural default are therefore not in fact present, it would be appropriate for this Court to resolve the claims that the district court refused to resolve.[11] At the least, the Court should remand to the district court to permit it to consider those claims in the first instance.[12]

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court issue an Order providing that this Court's mandate shall be withheld and the case shall be reheard *en banc* or the case will be remanded to the district court for further consideration.

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[11] Appellee has not defaulted those claims in this Court. Appellee's argument only became apparent when the Tennessee Supreme Court issued its Order. In addition, for the reasons stated in the text, it was reasonable for Appellee (having prevailed in the district court) not to continue to pursue those claims in this Court. Finally, there can be no reasonable dispute that, if this Court is going to consider issues not raised in the appellate briefing, it must do so evenhandedly. Hence, the Court would be justified in raising the Tennessee Supreme Court's ruling *sua sponte*.

[12] Appellee is preparing to file with the district court a protective motion under Fed. R. Civ. P. 60(b) that is based on the Tennessee Supreme Court's rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, on this 9th day of October, 2001 upon:

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Bradley A. MacLean

STATE v. ABU-ALI ABDUR'RAHMAN (formerly James Lee Jones)

PROSECUTORIAL MISCONDUCT

This Appendix describes most of the prosecutorial misconduct in Mr. Abdur'Rahman's case as supported by the judicial record. Citations to the record are: FT (federal district court transcript), FEx. (exhibit introduced into evidence in the district court hearing), P-CT (state post-conviction hearing transcript), and T (the original murder trial transcript).

A. The Context of the Prosecutorial Misconduct in this Case.

While the district court found that substantial evidence was never investigated by trial counsel and therefore never presented to the jury in Mr. Abdur'Rahman's case, the district court never addressed the merits of Mr. Abdur'Rahman's prosecutorial misconduct claims. However, although these claims were dismissed by the district court on procedural default grounds, in the district court evidentiary hearing Mr. Abdur'Rahman introduced the evidence supporting those claims. The state has never challenged this evidence, and the underlying facts supporting the prosecutorial misconduct claims cannot be reasonably disputed.

The instances of prosecutorial misconduct in this case establish more than just the withholding of significant and compelling evidence. When considered in their totality, the instances of prosecutorial misconduct establish a deliberate pattern and scheme of prosecutorial fraud from indictment to sentencing. This persistent and deceptive scheme did more than to keep the jury from hearing all the evidence; the ultimate effect was to portray an entirely false and misleading picture of every important aspect of this case.

The prosecutor in this case, Assistant District Attorney John Zimmermann, has a long

history of engaging in various forms of misconduct and deceptive practices.[1]

Zimmermann knew that obtaining a death sentence in this case would be problematic. He testified before the district court that in any capital case the prosecution must "explain everything to the jury." (FT 905). Zimmermann also perceived that in Davidson County, at least, capital jurors must be convinced "not beyond a reasonable doubt, but beyond a shadow of a doubt" if they are to impose a sentence of death. (FT 905-908).

Further, Zimmermann knew that this case presented its own specific problems that would make it particularly difficult to obtain a death sentence. In a memo to Assistant District Attorney Eddie Barnard (FEx. 42), and in his testimony in the District court (FT 908-09, 912-13), Zimmermann specifically identified some of the weaknesses in the prosecution's case, such as the following: (i) no one other than co-defendant Devalle Miller could identify Mr. Abdur'Rahman as the assailant; (ii) because only Miller could identify Mr. Abdur'Rahman as the assailant, it would be necessary to cut a deal with Miller in exchange for his testimony;[2] and, (iii) although "photographs of the decedent's house show blood spattering all over the kitchen ... [if Mr. Abdur'Rahman] did wear his coat the entire time he obviously was not present when the stabbing occurred." (FEx 42 at Bates stamp pp. 000677-8). Zimmermann acknowledged in his memo that, "The case is not open and shut on the issue of guilt." (Id. at p. 000681). In this same memo and in other documents in his file, Zimmermann also was aware that Mr. Abdur'Rahman had potential mental state defenses that could be raised at both the guilt and sentencing stages of

[1] Attached hereto as Appendix C is a memorandum describing instances in which courts in other cases have reprimanded Zimmermann for engaging in many of the same kinds of prosecutorial misconduct that occurred in Mr. Abdur'Rahman's case.

[2] It should be noted that pursuant to the recently issued policy of the Davidson County District Attorney General, "The death penalty will not be sought in cases where the evidence consists of the uncorroborated testimony of a single eyewitness or of a cooperating codefendant or accomplice." See, *Office of the District Attorney General, 20th Judicial District, Death Penalty Guidelines*, ¶ 9 (attached as Appendix G hereto) (emphasis added).

the case. (Id. at 000678-81).

Because of these and other problems with the case, Zimmermann violated his ethical and legal obligations to present the truth. He withheld key information and he invented his own facts to suit what he considered to be a winning theory for the prosecution.

B. The Types of Prosecutorial Misconduct in this Case.

The prosecutorial misconduct in this case can be divided into four general categories: (i) pretrial misrepresentations; (ii) Brady violations; (iii) improper manipulation of key witness testimony; and (iv) deceptive presentation of inadmissible evidence.

(1) Pretrial Misrepresentations.

(a) MTMHI Letter.

The first set of prosecutorial pretrial misrepresentations can be found in Zimmermann's February 10, 1987 letter to Middle Tennessee Mental Health Institute ("MTMHI") in connection with its psychological evaluation of Mr. Abdur'Rahman. (FEx. 34). At the time, Mr. Abdur'Rahman was not being represented by any attorney: his first attorney, Neal McAlpin, had effectively withdrawn from the case and his trial attorney, Lionel Barrett, had deliberately refrained from working on the case while awaiting the $10,000 balance of the promised retainer which he never received. (FT 694-5). Zimmermann's letter, therefore, was MTMHI's only outside source of information about Mr. Abdur'Rahman's prior criminal history and the circumstances surrounding the offense, and it was filled with fabrications.

> First, with regard to the Mr. Abdur'Rahman's prior murder conviction, the letter states: During those proceedings, and according to Court records, the defendant, through his counsel, moved the Court for a competency hearing and psychiatric evaluation as to his sanity. After those examinations were concluded the Court ruled that the defendant was competent and the Court directed the defendant to proceed to trial. There appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial.

(FEx. 34, p. 3). This was a deliberate falsehood. According to the transcript of the 1972 trial, which was in the prosecution's file, Mr. Abdur'Rahman did rely on the insanity defense. (FEx. 131). Indeed, as reflected in this transcript, at the 1972 trial Mr. Abdur'Rahman presented expert psychiatric testimony that he was insane, and the government's own psychiatric expert conceded that he could not be sure that Mr. Abdur'Rahman was able to control his behavior at the time of that offense.[3] Even Zimmermann's internal memorandum to Assistant District Attorney Eddie Bernard referred to the fact that Mr. Abdur'Rahman raised an insanity defense at his 1972 trial. (FEx. 42 at Bates stamp p.000679).

Second, the letter states that Mr. Abdur'Rahman "was not associated with [] particular religious organization." (Id. at p. 3). That was not true, for Mr. Abdur'Rahman was associated with the Southeastern Gospel Ministry (the "SGM"), a religiously oriented organization. It is not clear what Zimmermann knew about the SGM at the time he wrote the letter, but there is nothing in the prosecution's file that would support this statement. Zimmermann ultimately learned from Devalle Miller about the involvement of the SGM, but he never gave any of that information to the defense or to MTMHI. (P-C₮, Vol. III, pp. 13-43, discussed below).

Third, the letter states: "The police theorize that the defendant was relatively new to Nashville and making attempts to become entrenched as a drug distributor in Nashville;" and

[3] Under the Tennessee definition of insanity at the time, the testimony given by both psychiatrists in Mr. Abdur'Rahman's 1972 trial would have supported an insanity defense. See Graham v. State, 547 S.W.2d 531 (Tenn. 1977) (Tennessee definition of insanity); State v. Clayton, 656 S.W.2d 344, 346 (Tenn. 1983) (burden of proof is on the state to prove sanity beyond a reasonable doubt).

"Essentially, the victim in this case was wholesaling the Marijuana and that is the position the defendant wanted to assume." (Id. at 3-4). Such a theory was pure invention. It is not reflected in the police files. It is patently false and the state can point to no evidence that might support the theory.

Fourth, the letter states, "The victim in this case [Patrick Daniels] distributed marijuana from his home but did not distribute Cocaine." (Id. at 3). In fact, Daniels did distribute cocaine as reflected by the information obtained by the prosecution from the victim's brother. (FEx. 57). See also the police report describing "white powder" in one of the bathrooms (FEx. 3), the police report identifying a hypo syringe cap taken from Norma Norman (FEx. 4), and the autopsy report indicating that cocaine was found in the victim's urine (FEx. 14). (As discussed below, these police reports were never turned over to the defense.)

Fifth, the letter states, "The defendant had taken on the name of Scarface in the local drug community and that is all many of the people knew him by." (Id. at 4). If in fact the police ever thought that the Mr. Abdur'Rahman had been called Scarface, there is no reference in the prosecution's file, the police file, or any other known place, indicating that the Mr. Abdur'Rahman had assumed that name in the "drug community" or that that was the only name by which some people knew him.

Sixth, the letter states:

> He [the Mr. Abdur'Rahman] had advised the police and his attorney that the man he murdered in prison was a homosexual and that he murdered him in self-defense to prevent being raped. Further checking of court records reflect that the defendant was a leader of a prison gang attempting to gain control over the victim's gang and that the murder was a cold blooded premeditated murder, which reflects why the Federal judge gave the defendant the maximum punishment of life imprisonment when he could have sentenced the defendant to as little as ten (10) years for Murder in the Second Degree.

This, perhaps the most damaging of Zimmermann's statements to MTMHI, is a deliberate falsehood in several respects and, like Zimmermann's drug distribution theory mentioned above, is pure invention. The 1972 court records in fact confirm the Mr. Abdur'Rahman's claim that the 1972 murder was provoked by homosexual assaults on him. (FEx. 49 [Lowe's letter to Zimmermann], 131, 136 [Bishop deposition], and 142). There is no reference in the court records or federal prison records to any "prison gang." (See Bishop Deposition, FEx. 136). The term "gang" was Zimmermann's own creation out of thin air. (See Zimmermann's testimony, FT 1018-9). There was no evidence or testimony in the 1972 trial that the prior murder was a "cold blooded premeditated murder." In fact, both the prosecution psychiatrist and the defense psychiatrist who testified in that trial agreed that the killing was likely the result of a loss of control on the Mr. Abdur'Rahman's part. Finally, this statement fails to mention that the 1972 trial judge recommended in his final judgment that Mr. Abdur'Rahman be committed to an institution where he may receive psychiatric treatment. (FEx. 131).

While Zimmermann presented his fiction in his letter to MTMHI, he never furnished MTMHI (or the defense) with actual relevant information sitting in his file. For example, Zimmermann never informed MTMHI that shortly after the Mr. Abdur'Rahman's arrest and within forty-eight hours of the offense, Mr. Abdur'Rahman banged his head against the wall and the floor and was placed in a padded cell for two days. (FEx. 7, 8). Zimmermann also never furnished MTMHI with any of the records pertaining to Mr. Abdur'Rahman's 1972 prior murder conviction, where Mr. Abdur'Rahman presented a viable insanity defense, or Mr. Abdur'Rahman's 1970 prior assault conviction, which included a motion of the prosecution for a psychological evaluation prompted in part by the Mr. Abdur'Rahman's headbanging. (FEx. 49, 131).

Zimmermann's statements to MTMHI go beyond zealous advocacy. They step over the line into pure fraud and deception. These statements were of significance in MTMHI's evaluation of the Mr. Abdur'Rahman. As Dr. Craddock testified, MTMHI had virtually none of the Mr. Abdur'Rahman's prior institutional records, and MTMHI relied entirely upon Zimmermann's letter for information regarding the circumstances surrounding the offense. (FT 105-6, 109, 151-2).

(b) <u>Misrepresentations About Prior 1972 Murder</u>.

Zimmermann defrauded Mr. Barrett regarding Mr. Abdur'Rahman's prior 1972 murder conviction. Zimmermann falsely told Barrett that the 1972 murder was not a response to homosexual rape, as Mr. Abdur'Rahman claimed (and as was the case), but rather was part of a "turf war in the prison between the two gangs as to who would control the drug trade in the prison." (P-CT, Vol. III, p 169, FEx. 130). In the post-conviction proceeding, Zimmermann explained his strategy:

> "My purpose on that was to hopefully keep from getting into this 1972 murder, and if Mr. Barrett could see what we had and understand what kind of potential rebuttal evidence that it would confine the defendant's testimony since I'd already provided to him the documentary evidence as part of discovery. I wasn't concerned about a discovery violation. But it was basically a tactic that I've learned that in cases like this if you have evidence that is a little bit questionable, that could raise an appellate issue if it's introduced --"

(P-CT, Vol. III, p. 170, FEx. 130).[4]

In fact, contrary to Zimmermann's testimony in the post-conviction hearing, he had not provided Mr. Barrett with "the documentary evidence as part of discovery." Zimmermann had not provided Mr. Barrett with either the 1972 trial transcript or the letter Zimmermann had received from Magistrate David Lowe, the attorney who prosecuted the 1972 case. (FEx. 45). This

[4] Zimmermann called himself to the stand over the objection of Mr. Abdur'Rahman's state post-conviction counsel. The Court overruled the objection and permitted Zimmermann to testify even though he was an attorney representing the State at the hearing and he had given no prior notice that he intended to testify.

documentary evidence, which should have been turned over under Brady, supported Mr. Abdur'Rahman's version of the circumstances surrounding the 1972 murder, and it contradicted Zimmermann's statement that the murder was part of a "turf war" between "gangs" over the "drug trade" in the prison. None of the evidence mentioned either a turf war, gangs, or drugs. Instead, all of the documentary and testimonial evidence confirmed that the 1972 murder was related to homosexual attacks on the Mr. Abdur'Rahman.

Zimmermann attempted to justify his false statements to Mr. Barrett regarding the 1972 killing by claiming that he received his information from Mr. Delagrange, the F.B.I. agent Zimmermann brought to the Mr. Abdur'Rahman's trial. (FT 976-7). There are at least four problems with Zimmermann's attempted justification.

First, Zimmermann developed his theory about the 1972 killing, that it was part of a gang war over the drugs in the prison, before he ever talked to Delagrange. As mentioned above, Zimmermann set out this fabricated theory in his February 10, 1987, letter to MTMHI. (FEx. 34). It appears from the records in this case and Mr. Delagrange's testimony, however, that Zimmermann did not talk to Mr. Delagrange until after June 4, 1987. (See FEx. 61, 66, 70, and Delagrange's Depos., FEx. 136, at p. 21).

In this connection, it should be pointed out that according to correspondence in the prosecution's file, Zimmermann was attempting to portray the 1972 killing as a drug-related event before he ever talked to Delagrange . In his March 30, 1987 letter to David Lowe, Zimmermann said:

> I find it very difficult to believe that a Federal Judge would sentence an inmate to a life sentence in what purports to be nothing more than a defensive killing. Particularly when the circumstances underlying the killing involve a sexual attack upon the defendant. Therefore, it is imperative that we obtain information regarding the facts of this

> case and be prepared to offer them during the penalty phase of the trial.

(FEx. 45). In his April 10, 1987, letter to U.S. Attorney Henry Hudson, seeking permission to talk to David Lowe about the case, Zimmermann wrote:

> I am also interested in the fact that the previous Murder for which the defendant received a life sentence may pattern somewhat the manner in which the present case occurred.

(FEx. 48). From this correspondence and the other circumstances involved in this matter, it is clear that Zimmermann was actively pursuing information about the 1972 murder that would fit his fabricated theory that Mr. Abdur'Rahman was involved in "drug turf" wars. It is therefore clear that Zimmermann's false statements to Mr. Barrett about the 1972 murder were not the product of mere mistake on Zimmermann's part.

Second, Zimmermann gave this story to Mr. Barrett before the trial, and therefore before he brought Delagrange to Nashville. (Barrett testimony, FT 294-5).

Third, Delagrange had no knowledge of drugs or "gangs" in the prison. He therefore had no basis whatsoever for affirming the theory Zimmermann was advancing to Mr. Barrett. (See Delagrange's Depos., FEx. 136, at pp. 17-20). After Zimmermann made his first contact with Mr. Delagrange, he interviewed Mr. Delagrange maybe two or three times over the telephone and again after Mr. Delagrange came to Nashville. Zimmermann, therefore, had the opportunity to find out from Mr. Delagrange what his knowledge was and the basis of his knowledge. (Delagrange Depos., FEx. 136, at p. 34). It must be presumed that when Zimmermann introduced Mr. Delagrange to Mr. Barrett, which occurred in the hall of the courthouse in the middle of trial, Zimmermann was aware that Mr. Delagrange did not have the knowledge that Zimmermann represented to Mr. Barrett.

Fourth, there can be no satisfactory reason or explanation for Zimmermann's deceptive strategy in light of the fact that Zimmermann possessed documentation that contradicted the story he was conveying to the defense.

Mr. Barrett relied upon Zimmermann's misrepresentations about the circumstances of the 1972 murder. (FT 299). Although Mr. Barrett would not use the word "deceived," he testified in this proceeding that he was certainly "misled" by Zimmermann "as to the strength of any potential testimony my client might give along those lines." (FT 308).

(2) Brady Violations.

(a) 1972 Transcript.

The District court has held that the prosecution's failure to turn over the 1972 transcript of Mr. Abdur'Rahman's prior murder trial constituted a Brady violation but that, "standing alone," this violation was not material and was therefore not grounds for relief. 999 F. Supp. at 1089-90. As has been documented, that failure does not stand alone. Further, when viewed in the context of the other instances of prosecutorial misconduct, together with the ineffective assistance of defense counsel, this Brady violation takes on greater significance.

The prosecution was put on notice that the Mr. Abdur'Rahman's mental health might be an issue in the case. In response to Mr. McAlpin's motion, (FEx. 22), the trial court ordered the Mr. Abdur'Rahman's evaluation at MTMHI. (FEx. 28). On March 24, 1987, Mr. Barrett wrote Zimmermann and explained that he was "going to seriously look at my client's mental condition...." (FEx. 41). Zimmermann acknowledged receipt of this letter and the possibility that Mr. Barrett might raise an insanity defense. (FEx. 46). On July 1, 1987, Mr. Barrett wrote to Zimmermann stating that the defense might offer "some proof as to Mr. Jones' psychiatric status...." (FEx. 72).

The prosecution was aware of the possibility of mental state defenses from other sources as well. In his internal memo to Assistant District Attorney Eddie Barnard, "Team Leader," dated March 24, 1987 (FEx.42), Zimmermann made such statements as: "The defendant is just plain weird" (Bates stamp p. 000678); "I have received a copy of a transcript of the defendant's first trial where he plead not guilty by reason of insanity" (Bates stamp p. 000679); and "The Scarface element will undoubtedly have to be dealt with in some way so that the jury doesn't think the guy is plain wacko" (Bates stamp p. 000681).

Notwithstanding all of this, the prosecution deliberately withheld and actively concealed exculpatory information relating to the Mr. Abdur'Rahman's mental state, including the 1972 transcript.

As indicated in his internal memo to Eddie Barnard (FEx. 42), at least as early as March 24, 1987, Zimmermann had the 1972 transcript in his file. (FEx. 131). This transcript indicated that Dr. A.M. Masri, a psychiatrist, examined the Mr. Abdur'Rahman and testified for the defense, concluding that he "is basically a schizoid human being.... [W]e consider this an illness.... [H]e is a sick man." (FEx. 131, Bates stamp 767). Dr. Masri testified that the Mr. Abdur'Rahman was mentally ill and that as a result of this mental illness, he was unable to control himself under times of stress. On cross examination, based in part on testing conducted on the Mr. Abdur'Rahman, Dr. Masri testified that the Mr. Abdur'Rahman had a mental disease which consisted of "delusional thinking and paranoid and schizoid personality and inability to withstand pressure and have [sic] no control." (FEx. 131, Bates stamp 771). Dr. Masri, as did Drs. Sadoff and McCoy before the District court, concluded that Mr. Abdur'Rahman suffered from "borderline personality with periodic decompensation with loss of control, of ego control." (FEx. 131, Bates stamp p. 773). Even the psychiatrist who testified for the prosecution in the

1972 case, Dr. Robert J. Eardley, testified that the Mr. Abdur'Rahman lost control under the stress of the moment and, when asked if the Mr. Abdur'Rahman had been temporarily insane at the time, testified that he did not know. (See FEx 131, Bates stamp p. 781). The record of the 1972 case clearly indicates that Mr. Abdur'Rahman's mental state is, at the least, an exculpatory subject of relevant inquiry and consideration.

Zimmermann could give no satisfactory explanation for his failure to turn over the 1972 transcript. (FT 1014-7). Basically, all that Zimmermann could say was, "I didn't see the two as proving -- as what happened in '72 as proving what happened in '86. That was just my interpretation." (FT 1017).[5] To be exculpatory, however, evidence does not have to "prove" what happened at the time of the offense. It is improper for the prosecutor to make his own judgment as to the force of the evidence in determining whether he must turn it over to the defense. Zimmermann found that the 1972 transcript was significant enough to make reference to it in his memo to Eddie Barnard where he evaluated the strengths and weaknesses of their case against the Mr. Abdur'Rahman. (FEx. 42, Bates stamp p. 000679). This was clearly exculpatory information, and there is no valid excuse or reason for the prosecution's decision to withhold this transcript from the defense.

The prosecution's decision to withhold the 1972 transcript radically altered the course of the case. Mr. Barrett gave the following testimony in this proceeding:

> Q. If you had had the transcript of the 1972 trial and you had been aware in the 1972 trial James Jones had raised an insanity defense and you had been aware even the prosecution's expert witness said he may have lost control at the time of the incident, would you have handled this case differently?
>
> A. I very well might have. You have to break down as to the guilt or innocence phase and the sentencing phase.
>
> Certainly this information would have some bearing on both the guilt or innocence phase and the sentencing phase.
>
> I believe that had I had this information that I would have certainly taken a much closer look at any potential psychiatric defense that might be available to Mr. Jones both at the guilt and innocence phase and certainly as mitigation at the sentencing phase.
>
> Q. Would you have gone to the judge for money for psychiatric services?
>
> A. Based upon what I see here, I believe I would have, sir, yes.

(FT 309).

Zimmermann's decision to withhold the 1972 transcript is made more egregious by the fact that Zimmermann had in his file a letter dated April 15, 1987 which he received from Magistrate David G. Lowe, the person who was the prosecuting attorney in the Mr. Abdur'Rahman's 1972 case. (FEx. 49). This letter was in response to Zimmermann's request for information about the 1972 prior murder conviction. This letter stated that the 1972 killing was a response to homosexual attacks on the Mr. Abdur'Rahman. This information would have corroborated the Mr. Abdur'Rahman's version of what happened in 1972; it would have mitigated the effect of the prior murder conviction; and if it had been disclosed to the defense, it likely would have kept Zimmermann from making misrepresentations to Mr. Barrett about the 1972 case, as discussed above.

The information Zimmermann possessed about the 1972 case was significant for two reasons: it mitigated the effect of the prior murder conviction, which the prosecution used as an

[5] Zimmermann's attempted explanation for failing to turn over the 1972 transcript is strikingly similar to the explanation he gave in Garrett v. State, 2001 Tenn.Crim.App.LEXIS 206 (2001), for his decision to withhold exculpatory evidence in that case. In Garrett, the Tennessee Court of Criminal Appeals reversed a first degree murder conviction based upon Zimmermann's deceit. The Court said, "This Court is extremely troubled with General Zimmerman's decision to himself determine the reliability of the evidence and to refuse to turn [it] over," and further found that Zimmermann had "intentionally withheld" information and had misled the defense. See Appendix C , pp. 3-4, hereto.

aggravator supporting their request for the death sentence; and, it established the existence of Mr. Abdur'Rahman's mental illnesses and emotional instability and the likelihood of the existence of viable mental state defenses to the 1986 offense. Zimmermann's decision to withhold this information from the defense (and from MTMHI) can be explained in only one way, especially when viewed in the context of the other instances of prosecutorial misconduct: this was part of his successful scheme to fraudulently mislead first the defense lawyers, MTMHI, and then the court and jury about the nature of the 1972 case and about Mr. Abdur'Rahman's mental condition and character.

(b) Police Reports On Mr. Abdur'Rahman's Condition at Time of Arrest.

The prosecution also withheld important information about Mr. Abdur'Rahman's mental state at the time of his arrest less than forty-eight (48) hours af. the offense. Detective Garafola had prepared a police report that described the Mr. Abdur'Rahman at the police station upon Mr. Abdur'Rahman's arrest in the afternoon of February 19, 1986. (FEx 7). This report described the Mr. Abdur'Rahman as crying and went on to say:

> "He then started to hit his head on the table and then he jumped up still handcuffed to the chair and banged his head up against the wall. We got him under control and then took him to the booking room. In the booking room he started to bang his head on the wall again. Det. Elmore was able to control him."

This report was not turned over to the defense as Brady material prior to trial. When the report was turned over to the defense as Jencks material in connection with Detective Garafola's testimony, this portion of the report was redacted.

Second, there was an Incident Report regarding an incident that took place at 21:40 (9:40 p.m). on February 19, 1986, just hours after the arrest. This report stated that the Mr. Abdur'Rahman again started "beating his head against the floor," and that he was taken to a padded

cell with instructions to an officer to check on him every half hour. The next Incident Report indicates that the Mr. Abdur'Rahman was not taken from the padded cell until two days later, on February 21, 1986, at 3:15 p.m. (FEx. 8). This collection of documents also was not turned over to the defense either before or during the trial.

This was not a case of mere non-disclosure. By redacting the first report of head banging, the prosecution actively concealed this information from the defense. This was important information. According to the testimony in this case by Dr. Craddock of MTMHI, the State's mental health expert, headbanging is an "extremely unusual behavior" for adults with normal intelligence, (FT 125), and this kind of self-mutilating behavior is a possible sign of mental health problems such as Borderline Personality Disorder. (FT 130-2).

By deciding to withhold this information, the prosecution created for themselves the opportunity to falsely argue to the jury that Mr. Abdur'Rahman showed no emotion, was neither mentally ill nor emotionally unstable, but instead was just a depraved murderer who committed the act out of pure pleasure and enjoyment. If this information had been disclosed, the prosecution would not have been in a position to make these kinds of false and misleading arguments with any effect.

(c) Transcript of Miller's First Statement to Police.

The prosecution also failed to turn over to the defense prior to trial, as Brady material, the transcript of the April 23, 1987 tape recorded interview conducted by the prosecution of the co-defendant Devalle Miller. (FEx. 51). This transcript contains descriptions by Miller of the Mr.

Abdur'Rahman that suggest a possible mental state defense.[6] For example, Devalle Miller gave the following descriptions in his statement:

> "... and I was standing there and its like James went from day to night." (Bates stamp p. 000166).
>
> "...he was babbling on and on and on..." (Bates stamp p. 000167).
>
> "... because I was riding a uh uh to what I perceived as a maniac." (Bates stamp p. 171).
>
> "I really didn't want him in my house for the simple fact I didn't know if he was going to turn himself on back in my house with me and my family ..." (Bates stamp p. 000173).

The prosecutors themselves explicitly acknowledged that Devalle Miller's statements might raise a question about the Mr. Abdur'Rahman's mental health. In the margin of the transcript next to Miller's statement about how he perceived the Mr. Abdur'Rahman as a "maniac" (Bates stamp p. 000171), ADA Eddie Barnard had handwritten the comment: "Insanity + mitigating factor."

Although the prosecution did turn over this transcript as Jencks material during the course of the trial, that did not satisfy the prosecution's obligation under Brady. Exculpatory information about a defendant's mental state must be turned over sufficiently in advance of the trial to enable the defense to consider the defendant's potential guilt and sentencing stage defenses, to take steps to obtain a professional evaluation, and to prepare the case for trial.

(d) Miller's Statements to Prosecution about the SGM.

As discussed below, the prosecution spent hours with Miller preparing him to testify. From the testimony given by Miller in Miller's own sentencing hearing (FEx. 93) and in Mr. Abdur'Rahman's state post-conviction hearing (P-CT, Vol. III, pp. 13-43), it is now apparent

[6] This transcript was exculpatory for two reasons: (i) as discussed in this part of this Brief, it contained exculpatory information relevant to the Mr. Abdur'Rahman's mental state; and (ii) as explained below, it contained statements that contradicted Devalle Miller's trial testimony.

that Miller gave the prosecution at least the following information concerning the SGM and its involvement in the offense:

- that Miller and Mr. Abdur'Rahman joined the SGM, a racial identity religious organization devoted to bettering the Black community (P-CT, Vol. III, at 15);
- that Miller and Mr. Abdur'Rahman were "brainwashed" by the organization (Id. at 37);
- that there was a paramilitary group within the SGM that consisted of Allen Boyd, William Beard, Miller and Mr. Abdur'Rahman (Id. at 15);
- that Miller and Mr. Abdur'Rahman went to Daniels' apartment on the evening of the offense as part of an SGM mission to intimidate Daniels into ceasing his drug selling activities, which was part of the SGM's larger mission to rid the community of drug dealing (Id. at 19);
- that William Beard gave Miller a pistol to be used in "operations to clean up the Black neighborhoods (Id. at 16);
- that Mr. Abdur'Rahman told Miller that he, Mr. Abdur'Rahman, got his shotgun from Allen Boyd (Id. at 17);[7]
- that on the night of the killing, after leaving Daniels' house, Miller and Mr. Abdur'Rahman went to Miller's apartment and Mr. Abdur'Rahman made a telephone call from a booth; and Allen Boyd showed up a short time later (Id. at 26);
- that after leaving the victims' apartment, Miller heard Boyd say something to the effect of "just be cool and go back to work." (Id. at 28);
- that after Mr. Abdur'Rahman's arrest, Miller went to Beard who gave him getaway money (Id. at 29-31);
- that Miller intentionally misled Beard as to where he was going because he feared that Beard, Boyd and the SGM might kill him; Miller also told others while on the run that he was fearful of Boyd, Beard and Mitchell Hollie, all of the SGM (Id. at 31, 36-7); and wife, Karen, with financial assistance while Miller was on the run. (Id. at 35-6).

[7] The fact that Mr. Abdur'Rahman obtained his gun from Boyd was verified from the F.B.I. gun trace introduced into evidence in the District court proceeding. See *Motion to Expand Record* and *Order* entered April 8, 1998 (Docket Nos. 202, 204).

- that members of the SGM provided Miller's wife, Karen, with financial assistance while Miller was on the run. (Id. at 35-6).

Miller confirmed in his post-conviction testimony that he related all of this information to Zimmermann; and Zimmermann never disputed this either during his very brief cross-examination of Miller or elsewhere. (Id. at 33-5).

By deciding to withhold this Brady information from the defense, the prosecution created for themselves the opportunity to falsely portray Mr. Abdur'Rahman as the sole planner and decision-maker relating to the events surrounding the offense, and to "debunk" any effort by Mr. Abdur'Rahman to mention the SGM during his sentencing hearing.

(e) Lab Reports about Blood Evidence.

This Court previously considered the merits of Mr. Abdur'Rahman's Brady claim relating to the T.B.I. lab report which found that no blood was found on clothing seized from Mr. Abdur'Rahman's apartment, including Mr. Abdur'Rahman's long dark wool coat. This Court rejected this Brady claim on the ground that the lab report had been provided to Mr. Abdur'Rahman's first counsel, Mr. Neal McAlpin and had been filed with the trial court. 999 F.Supp. at 1090.

Although this Court has rejected this Brady claim, Zimmermann's conduct around the blood evidence was deceptive and further evidences both the prosecution's persistent and deliberate

scheme to deceive and the prejudicial effect of that scheme, especially when viewed cumulatively with the ineffective assistance of Mr. Abdur'Rahman's trial counsel.

Zimmermann was fully aware of the significance of the lab report. In his internal memo to Assistant District Attorney Eddie Barnard, Zimmermann identified the lab report as a "weakness in [the] case" as follows:

> T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by Jones. Photographs of the decedent's house show blood spattering all over the kitchen....[I]f the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred. Also, the police seized a pair of work pants during the search of the defendant's apartment which had red spots all over it which was found not to contain any human blood stain. The red particles on the defendant's pants came from red dye used at the publishing Board where the defendant worked.

(FEx 42 at Bates stamp p. 677). The police reports describing the crime scene, which were never turned over to the defense, also described the extensive blood splattering.

This "weakness" in the prosecution's case was confirmed by the evidence introduced before the District court. Zimmermann testified, "I think when you have a murder with this much splatter, you would think some would have gotten on the defendant, yes." (FT 917). Dr. Kris Sperry, the Medical Examiner for the State of Georgia, also testified before the District court that, based on his review of the autopsy report, the T.B.I. file, and the blood evidence, the assailant would have had blood stains on his clothes. Dr. Sperry also testified that the blood stains would not have been removed by cleaning or washing and would have been detected by the tests employed by the T.B.I.. (FT 38-61).

Although the prosecution may have provided the T.B.I. lab report to Mr. McAlpin, Mr. Abdur'Rahman's original counsel, Zimmermann deceptively managed to keep the lab report out

of Mr. Barrett's view. Prior to the trial Mr. Barrett filed with the court and served on the prosecutor a request for all exculpatory information. (FEx 63). The prosecution responded to this request by turning over to Mr. Barrett the results of the comparison tests of Mr. Abdur'Rahman's clothing to crime scene soil samples (FEx 62), which were of no exculpatory significance because Mr. Abdur'Rahman had always conceded that he was at the crime scene. But Zimmermann withheld the T.B.I. lab report. Further, in a letter from Zimmermann to Mr. Barrett dated March 30, 1987, in response to Mr. Barrett's "form discovery request," Zimmermann responded only to a specific Brady request for the identity of "other subjects or suspects that may be involved." (FEx 41, 46). Again, Zimmermann never notified Mr. Barrett about the exculpatory blood evidence. Whether or not these actions amount to a specific Brady violation, Zimmermann's conduct through this period prior to trial was not forthright and certainly was inconsistent with the prosecutor's duty to seek justice.

Zimmermann's ploy worked. Barrett never became aware of the T.B.I. lab report and therefore never raised any question at trial about the blood evidence.

As a consequence, Zimmermann was free to falsely use Mr. Abdur'Rahman's long dark wool coat at trial to help satisfy his need to identify Mr. Abdur'Rahman as the assailant, even though this coat tested negative for blood. Both of the prosecution's key witnesses at the trial testified that Mr. Abdur'Rahman was wearing his long black wool coat throughout the time period when the offense occurred. The prosecution introduced the coat into evidence during Norma Norman's testimony. (T 1333, trial exhibit 12). On at least five separate occasions during her testimony, she described Mr. Abdur'Rahman as wearing the "long black coat." (T 1332, 1334, 1343, 1364, 1366-7). The co-defendant Devalle Miller, on at least two separate occasions during his testimony, described Mr. Abdur'Rahman as wearing the coat during the

time of the offense, and he too identified trial exhibit 12 as the coat Mr. Abdur'Rahman was wearing. (T 1451, 1454-5). During the guilt stage closing argument, the prosecution displayed the coat to the jury, repeatedly describing it as the "gangster coat" that Mr. Abdur'Rahman wore at the time of the offense. (T 1672-3). Significantly, although the prosecution was aware of the weakness in their case from the lack of blood stains on the coat, and although as explained below they spent long hours on several occasions preparing (manipulating) Miller for his testimony, no one ever indicated that Mr. Abdur'Rahman ever took the coat off at any time while the offense occurred.[8]

(f) Other Police Reports.

Several other police reports were not turned over to the defense even though they contained exculpatory information. (FEx. 1-8, 9). Among other things, these police reports indicate that: blood was splattered on the walls of Daniels' apartment, which is exculpatory information relating to the question whether Mr. Abdur'Rahman actually performed the stabbings; "The chest of drawers in [the master bedroom] had not been opened. It did not appear that the room had been searched by anyone," which is exculpatory information relating to the question of whether Mr. Abdur'Rahman took the $300, which Norman had testified was taken from that location; and that when the first officers arrived at the scene, there were a number of people who had already been in the apartment, which is exculpatory evidence raising a question about whether, if $300 was stolen, Mr. Abdur'Rahman was the one who took the money. (See discussion below on the prosecution's manipulation of Norman's testimony on this point.)

[8] The failure to present the blood evidence was prejudicial to Mr. Abdur'Rahman at both the guilt and sentencing stages. At guilt, it would have raised at least reasonable doubt about whether Mr. Abdur'Rahman was the assailant and therefore whether he was guilty of premeditated murder. For the same reasons, at sentencing it would have raised at least "residual doubt" about whether he was the assailant, which is a mitigating factor to be considered by the jury. State v. Teague, 897 S.W.2d 248, 256

(3) **Altering Testimony**.

(a) **Miller's Testimony**.

There were clear and obvious inconsistencies between Miller's April 23 statement (FEx. 51) and Miller's trial testimony. The circumstances of this case demonstrate that the prosecution improperly manipulated Miller's testimony to conform to the false picture the prosecution presented to the jury.

Brady requires the prosecution to disclose information that could be used to impeach the credibility of the prosecution's witness. In this case, the prosecution violated Brady by failing to disclose to the defense, prior to trial, the fact that Devalle Miller changed his story to the prosecution, and that his trial testimony would contradict in many material respects the statements he previously gave to the prosecution.

It goes without saying that in a case of this sort, the credibility of a co-defendant's testimony will be suspect. As Zimmermann said, "[W]hen you have co-defendants they always want to point the finger at each other." (FT 912).

Because of the problems with the blood evidence and the lack of other evidence that might establish the Mr. Abdur'Rahman as the assailant, the prosecution realized that Miller was a crucial witness to them. The prosecution, therefore, worked on Miller intensively.

They took advantage of the one day Miller was in Tennessee unrepresented by counsel, April 23, 1987, to interview him. See Ross Alderman's testimony (FT 1026-30). Zimmermann testified before the District court that he would not interview somebody charged with murder if they are unrepresented by counsel unless they "execute a waiver of counsel." (FT 934). Yet, there is no indication that Miller executed a waiver of counsel when the prosecution interviewed him on that

(Tenn. 1995); State v. Hartman, 42 S.W.3d 44 (Tenn. 2001). The jury affidavits in this case demonstrate that the blood evidence is a powerful mitigating factor.

day. The following day Miller was appointed counsel when he appeared for the first time in court on the jail docket and he was represented continuously thereafter.

Subsequently, the prosecution was advised that Miller's story had changed. Miller's attorney, Ross Alderman, told Zimmermann that there were discrepancies between Miller's version of what happened as compared to the version Miller set forth in his April 23 interview. (FT 1033). The prosecution then decided to spend time with Miller. Zimmermann testified before the Federal District Court that if he had to interview a co-defendant witness more than once or twice, it would be "because, in my opinion, I am trying to find additional evidence, other leads, things to corroborate their testimony." (FT 938). It is clear from the facts of this case, however, that Zimmermann did more with Miller than pursue additional evidence or other leads. He coached Miller to shape his testimony. (See, e.g., FT 1037).

Consequently, the prosecution met with Miller to prepare his testimony. Zimmermann testified before the District court that he could "only remember one time where we had what I would call a pretrial preparation meeting." (FT 938). In fact, according to Mr. Alderman's testimony, in addition to the April 23 interview and the mid-June meeting, the prosecution also met with Miller on July 6 for 3.4 hours, July 7 for 3.5 hours, July 9 for 3.6 hours, and July 12 for 2.5 hours, for a total of 13 hours during the days immediately preceding the guilt stage of the trial where Miller testified. (FT 1034-8). Mr. Alderman testified that it seemed as if Zimmermann was spending a "long time" preparing Miller to testify. (FT 1036-7). During those meetings Zimmermann explained to Miller what other witnesses were going to say. (Id.) Mr. Alderman further testified in this proceeding that there were significant discrepancies between the version of the facts described by Miller in these meetings and the version he gave in his April 23 statement. (Id.) Also during these interviews Miller told Zimmermann about the SGM. (FT

1038-40). He described the group as a paramilitary arm of the Gospel Ministry which had a plan to drive drug dealers out of the community. (FT 1039). He identified the leaders of this group as Boyd, Beard and Hollie, and he expressed concern or fear of what others might do to him if he testified. (FT 1040). Zimmermann never disclosed before trial the fact that Miller had changed his story or any of the information Zimmermann acquired during the course of his interviews of Miller.[9]

(b) Norman's Testimony.

The indictment against Mr. Abdur'Rahman included a count charging that Mr. Abdur'Rahman "did steal, take and carry away from the person and against the will of Patrick Daniels, certain personal property, to wit, approximately three hundred dollars ..." (T. 1270-1). In addition to seeking a conviction against Mr. Abdur'Rahman on this charge, the prosecution also included this charge as one of the aggravating circumstances supporting their request for the death penalty. There was, however, no evidence that anyone took any money from Patrick Daniels. At the time of trial, there was only a suggestion that money may have been stolen from Norma Norman, and not from "the person of Patrick Daniels."

[9] To induce Miller to give the testimony the prosecution was looking for, the prosecution offered Miller a deal. Miller was charged along with the Mr. Abdur'Rahman with capital first degree murder, assault with intent to commit murder in the first degree with bodily injury, and armed robbery. (FEx. 44). In exchange for his testimony, the prosecution offered a plea bargain that would reduce the original three charges to the two reduced charges of second degree murder and armed robbery. (FEx. 92; Alderman testimony, FT 1041-3). Instead of a possible death sentence or life sentence, the reduced charges would carry sentences ranging from 10 to 35 years with the possibility of earlier parole. (FT 1044; FEx. 93).

The defense requested the terms of any settlement agreement between the State and any witness in return for the witness's testimony. (FEx. 42, Discovery Requests, ¶ 12). Prior to the trial the prosecution filed a RESPONSE TO MOTION FOR EXCULPATORY MATERIAL REGARDING PROMISES TO STATE'S WITNESSES, in which the prosecution purported to set forth the terms of its agreement with Miller. (FEx. 67). This Response disclosed only that the prosecution had agreed not to seek the death penalty. This Response failed to disclose that the prosecution had also agreed to a plea to reduced charges that would limit the length of any prison sentence Miller might receive. By failing to disclose all of the terms of the plea agreement that were favorable to Miller to induce his testimony, the State violated the Mr. Abdur'Rahman's due process rights under Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104.

To get around this problem, the prosecution determined to manipulate Norman's testimony by asking falsely misleading questions. In their trial notes, the prosecutors wrote with regard to this matter, "Items taken - $300 cash and anytime teller card (leading questions to make her say it was theirs)," and "$300 and anytime teller card (leading question to say cash was theirs)." (FEx. 77).

The leading questions by the prosecution worked, for Norman gave the desired response to the leading questions. (See T. 1390). Through their improper use of false leading questions, the prosecution managed to conform Norman's testimony to the indictment.

In this context, it should be further pointed out that a careful reading of Norman's testimony establishes either that the $300 never existed or, if it did, Mr. Abdur'Rahman was not the person who took it. Earlier, Norman testified that the $300 was in the chest of drawers in the bedroom. (T. 1389). She offered no testimony that Mr. Abdur'Rahman or Miller ever went into this bedroom. Her only testimony on the alleged "theft" of the money was:

> Q. Was the [$300] there when they left?
>
> A. Not that I know of.
>
> Q. Did they take it?
>
> A. Not that I know of.

(T. 1390). Notwithstanding this testimony, and the absence of any other proof on the subject, Zimmermann proceeded to falsely argue at closing that Mr. Abdur'Rahman "was the only one that went through the bedroom.... Ms. Norman said, he went and rummaged through the room." (T. 1669).

This represents but one more example of the ineffective assistance of Mr. Abdur'Rahman's trial counsel, Zimmermann's unethical opportunism in taking advantage of defense counsel's failings, and the resulting false picture that was presented to the jury.

(4) Inadmissible Information to the Jury.

This claim was presented to the Tennessee Supreme Court on the direct appeal where it was held that the prosecution had, in fact, acted improperly. This Court found that this constituted prosecutorial misconduct. Describing Zimmermann's behavior, this Court found:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. Defendant's parole officer, who was identified only as an employee of the U.S. District Court in Nashville, testified to introduce the fact of defendant's two prior convictions for second degree murder and assault with a deadly weapon. The State was allowed over defense objection to ask the nature of the deadly weapon. The witness answered that it was a knife. The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. The action of the State was **improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn.1990).[10]

[10] In the direct appeal, of course, this was the only prosecutorial misconduct claim presented to the Tennessee Supreme Court. This misconduct obviously represents only a fraction of the total body of prosecutorial misconduct that was later discovered during collateral litigation.

C. Effect of Prosecutorial Misconduct: False Picture of the Case.

The prosecution's persistent pattern of fraud and deception combined with the ineffective assistance of defense counsel, presented the jury with a completely false picture of every aspect of this case. Among other things, the jury was given a false picture of: (i) the Mr. Abdur'Rahman as a person; (ii) the nature of the prior 1972 conviction; (iii) the circumstances surrounding the offense including Mr. Abdur'Rahman's motivation and the identity of the assailant; and (iv) Mr. Abdur'Rahman's attitude towards the offense.

In other words, this is not merely a case where the jury failed to hear everything that it should have heard. This is a case where what the jury did hear was patently false, misleading and grossly prejudicial.

(1) False Picture of the Mr. Abdur'Rahman as a Person.

The effect of obfuscating the blood evidence, misrepresenting to MTMHI and defense counsel the circumstances surrounding Mr. Abdur'Rahman's prior murder conviction, and withholding evidence on these matters, was to paint a false and misleading picture of Mr. Abdur'Rahman as a person.

The defense was oblivious to the fact that Mr. Abdur'Rahman's coat tested negative for blood stains and to the significance of any of the blood evidence in the case (especially in light of the withheld police reports describing the extent of blood splattering at the scene of the offense). The prosecution took advantage of defense counsel's oblivion by using the coat to graphically mischaracterize Mr. Abdur'Rahman as merely a drug stealing "gangster." Throughout the trial the prosecution relied upon the coat as the item of clothing Mr. Abdur'Rahman wore during the offense and referred to it as the "gangster coat."

In the trial, the prosecution introduced Mr. Abdur'Rahman's coat as Exhibit 12 (T. 1333) and elicited the following testimony from Norma Norman:

> A. ...Mr. Jones had on this **long black coat**,...

(T. 1332).

> Q. Anything about that coat cause you any concern?
>
> A. First thing I thought, it was a **gangster coat**.
>
> Q. A **gangster coat**?
>
> A. Yes.

(T. 1334).

> A. And Mr. Jones walks in [to the apartment] and he had on this **long black coat**.
>
> Q. Same coat that you described for the ladies and gentlemen of the jury?
>
> A. Right."

(T. 1343).

The prosecution then referred to the "gangster coat" in their guilt stage closing argument:

> He had a **gangster coat** on, is what she called it – a **gangster coat**. And she noticed that. Now, I don't know what you call a **gangster coat**, but that is what she saw **(indicating exhibit)**, and she remembered it. **And he wore it that night**.

(T. 1672-3).

> Listen to this, ladies and gentlemen, the man, the next night, when he goes over there and he says we're going to stab these people, he goes by his house, and what does he do, he changes into his **gangster uniform**.

(T. 1673).

If the blood evidence had been disclosed in a forthright manner, and if the defense had properly evaluated that evidence, the prosecution would have been unable to use the coat in this manner to wrongfully characterize Mr. Abdur'Rahman as a "gangster." Zimmermann was well aware that the victim's blood was not on the coat and, as pointed out above, in an internal memo he specifically referred to that fact as a weakness in the case. (FEx. 42, Bates stamp 000678). It was therefore a deceit for him to display the coat to the jury, representing that Mr. Abdur'Rahman wore the coat that evening, while at the same time withholding the information that the coat had tested negative for blood stains.

(2) <u>False Portrayal of 1972 Conviction</u>.

The prosecution also took advantage of the effect of their misconduct to mischaracterize Mr. Abdur'Rahman's prior murder as a premeditated, deliberate murder, contrary to all of the evidence in the 1972 case.

> Because you see, he had faced this jury before; not you, but he had faced a jury before and heard the very same thing before, when he murdered someone else, **willfully, deliberately with malice aforethought**.

(Sentencing stage closing argument, T. 1979).

> Ladies and gentlemen, he was a murderer, and he was a murderer before he ever got in that group – just a low down murderer, no morals – no morals.

(Sentencing stage closing argument, T. 1982).

If the prosecution had refrained from misrepresenting the circumstances surrounding the 1972 conviction and had disclosed the exculpatory evidence in their files about the 1972 case, and if Mr. Abdur'Rahman's counsel had properly investigated the 1972 case, then this false characterization never would have been presented to the jury. Instead, the jury would have been told the truth: that the 1972 murder was an emotionally charged response by a mentally ill

person to repeated homosexual rape in prison and, that under the Tennessee definition of insanity at least, Mr. Abdur'Rahman probably was insane at the time of that offense. The prosecution never would have gotten away with mischaracterizing the 1972 murder in a prejudicial way as a "deliberate" murder.

(3) False Picture of the Circumstances Surrounding the 1986 Offense.

By failing to turn over Brady material regarding Miller's prior statements to the prosecution and information about the SGM, and by improperly manipulating Miller to give false and misleading testimony, the prosecution created the situation where they could deliberately misrepresent to the jury the circumstances surrounding the offense in this case. Although Mr. Abdur'Rahman and Miller went to Daniels' apartment as part of a mission organized by the SGM (including Allen Boyd and William Beard) with the altruistic (albeit misguided) purpose of ridding the community of drugs, the prosecution mischaracterized the offense as a pure drug robbery entirely designed and led by Mr. Abdur'Rahman.

The prosecution began the mischaracterization of the offense in their guilt stage opening statement:

> And later that evening the defendant told Mr. Miller that he knew of a guy that they can roll, that they could rob, that they could gangster him and steal his drugs.

(T. 1275).

The prosecution, through Miller's manipulated testimony, further characterized the offense as a drug robbery without any reference to the SGM or the motives behind the event:

> A little bit later on he had pulled me off to the side and he said, you know, this little punk over here that I got this from has got some pretty good reefer, you know, I think we can probably go over there and ... He told me that he had got some good weed from the guy. The guy had some good weed. And he had reason to believe that he had more. And he said that the guy was a little

> punk and we could probably go gangster him.... To me that meant, going, taking his dope, his marijuana – rousting him up and, you know, taking his --- [Robbing him?] Yes.

(T. 1449-50).

Also through Miller's manipulated testimony, the prosecution characterized the "plan" as entirely Mr. Abdur'Rahman's, again without reference to the SGM:

> Q. Did you agree to that plan?
>
> A. Yes, I did.
>
> Q. Whose plan was it?
>
> A. It was the defendant's.

(T. 1451).

This false characterization was carried into the prosecution's guilt stage closing argument where the prosecution misrepresented to the jury:

> And who was the leader of this whole thing? Who gave all the orders? Who gave all of the commands?" [Referring to Mr. Abdur'Rahman.]

(T. 1706).

The multiple instances of prosecutorial misconduct finally enabled the prosecution, in the sentencing stage closing argument, to discredit as "bunk" any notion that the SGM was involved, even though the prosecution was told about the SGM's involvement:

> [H]e [the Mr. Abdur'Rahman] knows that that story about being a religious cause will be rejected by you as bunk.

(T. 1982-3).

If the prosecution had honored their Brady obligation by turning over to the defense prior to trial the statements made to them by Miller and the information they had received about the

SGM, and if defense counsel had properly investigated this case, the prosecution never would have been in a position to paint this kind of false and prejudicial picture to the jury.

(4) False Picture of Mr. Abdur'Rahman's Attitude Towards the Offense.

By deliberately making misrepresentations to MTMHI and to defense counsel regarding Mr. Abdur'Rahman's prior 1972 murder conviction, and by withholding Brady material regarding both the prior conviction and the other signs of Mr. Abdur'Rahman's mental illnesses and emotional instability, the prosecution was able to invent for the jury the prosecution's own false picture of Mr. Abdur'Rahman as a "depraved killer" who had no psychological or emotional problems.

The prosecution repeatedly misrepresented to the jury that Mr. Abdur'Rahman had no emotional or psychological problems and therefore was just a "depraved" completely immoral person, which clearly is not the case. The prosecution established this false theme at the outset of the sentencing hearing:

> [I]t showed the depraved mind the defendant really has. Not a sick mind. **Not so sick of a mind that he is mentally ill**, just depraved – just depraved.

(Sentencing stage opening statement, T. 1805).

This theme was carried through to the sentencing stage closing argument:

> That's because, ladies and gentlemen, you're looking at a depraved man, **not someone suffering from severe extreme emotional disturbance**, a depraved man.

(Sentencing stage closing argument, T. 1981).

> [N]ow, he [defense counsel] voir dired you on, would you believe a psychiatrist, or a psychiatric examination or whatever, about **extreme emotional disturbance or whatever? There is none of that here today**.

(Sentencing stage closing argument, T. 1981-2).[11]

Because the prosecution's pattern of misconduct, combined with the ineffectiveness of defense counsel, allowed the prosecution to falsely portray Mr. Abdur'Rahman as being a person without mental illness or emotional disturbance, the prosecution created a situation where it could falsely claim in a highly prejudicial manner that Mr. Abdur'Rahman killed for "pure pleasure" and "enjoyment". The prosecution struck this theme in the guilt stage of the case and carried over to the sentencing stage through effective repetition:

> Whoever did that, ladies and gentlemen, **enjoyed it**, had to have.

(Guilt stage closing argument, T. 1679).

> It was all part of the **enjoyment** that person who did the stabbing had.

(Guilt stage closing argument, T. 1711).

> Is there any reason, is there any justification why he took the life of Patrick Daniels? Is there any? None, except **pure pleasure**.

[11] In fact, there is abundant and irrefutable evidence that Mr. Abdur'Rahman suffers from mental illness and that he had mental state guilt stage defenses available to him at the time of his trial. Mr. Abdur'Rahman has a long documented history of displaying symptoms of mental illness, of being institutionalized for and receiving diagnoses of mental illness, and of being administered powerful antipsychotic and other medications for mental illness. See Social History (FEx. 141). As pointed out elsewhere, in Mr. Abdur'Rahman's 1972 trial Dr. Masri, a psychiatrist, gave Mr. Abdur'Rahman a borderline personality diagnosis and testified further that Mr. Abdur'Rahman "decompensates" when under stress – an evaluation similar to Dr. Sadoff's evaluation presented to the District court. Even the psychiatrist who testified for the prosecution in the 1972 case, Dr. Robert J. Eardley, testified that the Mr. Abdur'Rahman lost control under the stress of the moment and, when asked if the Mr. Abdur'Rahman had been temporarily insane at the time, testified that he did not know. (See FEx. 131, Bates stamp p. 781). In Mr. Abdur'Rahman's state post-conviction hearing, Dr. Nurcombe, a psychiatrist, similarly diagnosed Mr. Abdur'Rahman with Post-Traumatic Stress Disorder. Dr. Nurcombe's testimony went unchallenged by the state. In this habeas proceeding, both Dr. Sadoff and Dr. McCoy diagnosed Mr. Abdur'Rahman with mental illnesses. Although Dr. Craddock of MTMHI did not give Mr. Abdur'Rahman a diagnosis, he admitted that he did not have access to Mr. Abdur'Rahman's social history, and he acknowledged many of the symptoms of Mr. Abdur'Rahman's mental illness. (FT. 130-2). Dr. Craddock, therefore, testified before the District court that he "would not take issue" with a diagnosis of Borderline Personality Disorder for Mr. Abdur'Rahman. (FT. 140). Dr. Craddock acknowledged that persons with this kind of disorder can suffer dissociative and psychotic episodes. (FT. 129, 132: "That is what borderline personality disorder means. The borderline of becoming psychotic.") Dr. Craddock also admitted that he never reached an opinion on whether or not Mr. Abdur'Rahman had a diminished capacity mental state guilt stage defense, or whether or not Mr. Abdur'Rahman's mental condition might be a mitigating factor at sentencing. (FT. 142-3).

(Sentencing stage closing argument, T. 1942).

> Ladies and gentlemen, as a man thinketh in his heart, so is he. And you saw the real James Jones in the picture. And now, when you saw those convictions, you know that's the real James Jones because that's how he is. and when he comes here from Chicago, he is not here two years before a vicious brutal murder at his hands – at his planning – **at his enjoyment** – and that's depraved.

(Sentencing stage closing argument, T. 1984-5).

The net effect of the prosecutorial misconduct together with the ineffective assistance of counsel, therefore, was to falsely paint Mr. Abdur'Rahman as the ideal candidate for a guilty verdict for premeditated murder and the death sentence: a cool-minded "depraved" "gangster" with "no morals" and free of any mental illness or emotional disturbance who singularly planned and led a drug robbery, designed purely for personal gain, and in the course of that robbery killed for pure pleasure and enjoyment. As the abundant and compelling evidence in this habeas proceeding shows, however, Mr. Abdur'Rahman is not that type of person, the SGM was deeply involved in directing Mr. Abdur'Rahman's actions, and the true circumstances surrounding the offense are entirely different from what the prosecution falsely portrayed to the jury. As the jury affidavits demonstrate, and as should be clear from the face of the record after considering the cumulative effect of all the errors in this case, if the jury had been presented with the true picture of Mr. Abdur'Rahman and the circumstances surrounding the offense, the result of the trial would have been completely different.

STATE v. ABU-ALI ABDUR'RAHMAN (formerly James Lee Jones)

COURT REPRIMANDS OF ZIMMERMANN

In a string of court opinions over the course of Zimmermann's career as a prosecutor (including opinions in Abu-Ali's case), the courts have repeatedly reprimanded Zimmermann for various legal and disciplinary violations. These reprimands demonstrate certain persistent patterns:

(i) Zimmermann's pattern of withholding exculpatory evidence;

(ii) Zimmermann's pattern of "misleading" defense counsel and the court; and

(iii) Zimmermann's pattern of knowingly violating court rulings relating to inadmissibility of evidence and improper jury argument.

Some of these court opinions are listed below:

1. In the direct appeal of Abu-Ali's case from the trial court to the Tennessee Supreme Court, Zimmermann was reprimanded by the Tennessee Supreme Court for handing inadmissible material to the jury during Abu-Ali's sentencing hearing. The Tennessee Supreme Court said:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. .... The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. **The action of the State was improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn. 1990). The Tennessee Supreme Court held, however, that this prosecutorial misconduct was "harmless," and therefore denied this claim as a basis for reversing the death sentence.

2. In the federal district court habeas proceeding, Judge Campbell held that Zimmermann committed a Brady violation by failing to turn over to Abu-Ali's trial counsel the transcript of Abu-Ali's prior (1972) murder trial. This transcript contained testimony of two

psychiatrists, one for the defense and the other for the prosecution, which described aspects of Abu-Ali's mental illnesses and would have supported an insanity defense under Tennessee's definition of insanity. Although Judge Campbell found that Zimmermann had violated his Brady obligation to turn over this exculpatory evidence, Judge Campbell also found that, "standing alone," this instance of prosecutorial misconduct did not "undermine[s] confidence in the outcome of the sentencing hearing," and therefore he rejected this claim as a basis for awarding Abu-Ali relief. Abu-Ali Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1089-90 (M.D.Tenn. 1998). Judge Campbell, however, did grant relief on grounds of ineffective assistance of counsel.

4. In In re Zimmerman, 1986 WL 8586 (Tenn.Crim.App. 1986), Zimmerman was held in contempt of court for violating Rule 16, Tenn.R.Crim.P., which is the rule requiring the prosecution to disclose certain types of evidence to the defense prior to trial. Zimmermann argued that his noncompliance with Rule 16 "was clearly made through oversight" (his words) and was not "willful." The Court of Criminal Appeals said that this was not an excuse and characterized Zimmermann's actions as an **"abuse of, or unlawful interference with, the process or proceedings of the court."**

5. In Zimmermann v. Board of Professional Responsibility, 764 S.W.2d 757 (1989), Zimmermann was sanctioned for making inappropriate comments to the press in violation of the disciplinary rules. The court rejected his argument that his comments were protected by the First Amendment.

6. According to a Tennessean article published May 30, 1998, in the case of State v. Vukelich Zimmermann was chastised by Davidson County Circuit Court Judge Gayden for "misleading" the court into improperly issuing a seizure order for the seizure of a $102,000 investment account owned by the defendant and his wife which allegedly contained the proceeds of drug sales. According to the article:

> Circuit Judge Hamilton Gayden testified that he should not have signed the original seizure order March 13. Gayden said that, "upon reflection," he believes Zimmermann and Metro Drug investigator Ed Rigsby did not present enough evidence about the source of the funds to justify seizing them as the fruits of illegal drug dealing...The judge testified that **Zimmermann and Rigsby misled him into believing** that the money in the mutual fund account came from illegal activity."

Judge Gayden set aside the seizure order and directed that the investment account be returned to the Vukelichs.

7. In State v. Middlebrooks, 995 S.W.2d 550 (1999), a death penalty case, Zimmermann was reprimanded for making two kinds of improper closing arguments to the jury at the conclusion of capital sentencing hearing. First, the court found that Zimmermann's "victim impact" argument was improper:

> [T]he prosecutor's statement, "his family asks you to impose the death penalty," was improper. Although evidence to this effect was not introduced during the sentencing hearing, and would have been inadmissible, the prosecutor's statement clearly is an improper characterization of the family's view as to the appropriate sentence.

Id. at 558. Secondly, the court found that Zimmermann's biblical references during closing argument (which were extensive) were also improper:

> We have condemned Biblical and scriptural references in a prosecutor's closing argument so frequently that it is difficult not to conclude that the remarks in this case were made **either with blatant disregard for our decisions or a level of astonishing ignorance of the state of the law** in this regard.... As we said in Cribbs, "in the face of this clear and longstanding precedent, **the repeated introduction by prosecutors of such references into trials of serious criminal offenses is inexplicable**."

Id. at 559. Although the court found these arguments to be improper, it also determined that these errors were harmless and therefore the court did not reverse the judgment below.

8. The more recent case of Garrett v. State, 2001 Tenn.Crim.App. LEXIS 206 (2001), presents a particularly egregious example of prosecutorial misconduct. The defendant was convicted of first degree murder and sentenced to life. The prosecution's theory at trial was that the defendant locked the victim in the room of a house and then burned the house down, killing the victim. A key factual issue at trial was whether the room where the victim was found had been locked from the outside, which is what the prosecution alleged. Zimmermann had in his files an eleven-page report by an investigator which described a conversation with the Fire Detective who told the author of the report that the door to the room was, in fact, unlocked. Zimmerman never turned his report over to the defense counsel. In the post-conviction hearing, Zimmermann explained that he did not turn over this report to the defense because, essentially, he felt this information was unreliable. The Tennessee Court of Appeals rejected Zimmermann's explanation and found that he committed a Brady violation. Consequently, the court set aside the conviction and granted the defendant a new trial. The Court said:

> We are most troubled with the eleven-page Miller Report, which was not disclosed to the defendant.... The State contends that this report was neither withheld, exculpatory, nor material. We disagree in all respects. The evidence in the post-conviction hearing showed that **the prosecutor led defense counsel to believe** that the State had no information about the locked or unlocked status of the utility room door. However, at trial the State's witnesses testified that the utility room door was locked and the prosecutor submitted to the jury as the theory of the State's case that the defendant locked the victim in the utility room and set the house on fire. Therefore, the State did have, prior to trial, information that the door was locked. In fact, not only did the State have information that the door to the utility room was locked, but they also possessed the eleven-page Miller Report, which indicated otherwise: that Fire Captain Jenkins, who was the firs to enter the utility room and find the victim's body, found the door unlocked.
>
> This eleven-page report was clearly withheld from the defendant. However, the State, in its brief, claims that because Officer Miller informed

> defense counsel that the door was unlocked then this information was not withheld. The State's assertion that the defendant was aware that the State had no information that the door was locked is undermined by the State relying so heavily at trial on testimony that the door was locked. Assistant District Attorney General Zimmerman, when questioned at the post conviction hearing as to why he did not include the eleven-page report in discover, stated, "I felt like Detective Miller's recollection was vague, he could not specifically remember the conversation he had with Captain Jenkins, and all he knew is what he had recorded in his report, which was equivocal, at best, and Jenkins was absolutely clear on it." **This Court is extremely troubled with General Zimmerman's decision** to himself determine the reliability of the evidence and to refuse to turn over evidence he believes is unreliable, especially when the evidence is requested and is exculpatory.
>
> Essentially, the State **intentionally withheld the information by leading the defendant to believe** they had no information about the status of the door and then pursuing the very opposite theory at trial: that the defendant had locked the victim in the utility room and set the house on fire. We agree with the defendant that the information was withheld.

9. State v. Vukelich, 2001 Tenn.Crim.App. LEXIS 734 (Sept. 11, 2001), was a drug trafficking and money laundering case that went to trial two times. In the first trial, Zimmermann asked a witness whether he had smoked marijuana with the defendant on two prior occasions. The trial judge ruled those questions to be irrelevant and inadmissible. In the second trial, despite the trial judge's ruling in the first trial, Zimmermann asked the same witness the very same questions. As described by the appellate court:

> The [trial] court immediately asked for a bench conference and excused the jury. The prosecutor apologized and claimed to have forgotten the trial court's earlier ruling, and **the trial court strongly admonished the prosecutor**.

Later in the opinion, the appellate court said that "the testimony solicited was **patently improper** given the trial court's previous ruling." The appellate court went on to say, however, that this error was harmless because the other evidence of the defendant's guilt was substantial.

(4)

No. 01-9094

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
MAR 26 20
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ABU-ALI ABDUR'RAHMAN,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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21 pp

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

Whether a post-judgment motion filed in the district court under Fed. R. Civ. P. 60(b), which sought to reopen constitutional claims that had been dismissed as procedurally defaulted, was a second or successive habeas corpus petition.

II.

Whether the court of appeals abused its discretion by declining to rehear or remand petitioner's appeal of the denial of his habeas corpus petition when the claims petitioner sought to have reheard or reconsidered were not the subject of that appeal.

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On February 11, 2002, the United States Court of Appeals for the Sixth Circuit issued an order denying, *inter alia*, petitioner's application for leave to file a second habeas corpus petition; the court also denied petitioner's motion to withhold the mandate in, and to rehear or remand, his appeal of the denial of his original habeas corpus petition. This order (Pet. App. B1-B2) is unpublished.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §§ 1254(1). As more particularly discussed below, respondent submits that the Court, by virtue of 28 U.S.C. § 2244(b)(3)(E), lacks jurisdiction to review the first issue presented by petitioner.

STATEMENT OF THE CASE

In 1987, petitioner, then known as James Lee Jones, was convicted of first degree murder, assault with intent to commit first degree murder with bodily injury, and armed robbery. After the sentencing phase of petitioner's trial, the jury sentenced petitioner to death, finding three aggravating circumstances: 1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; 2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and 3) the murder was committed while the defendant was

engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, or kidnapping.[1] The Tennessee Supreme Court affirmed the judgment, *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990), and this Court denied certiorari. *Jones v. Tennessee*, 498 U.S. 908 (1990).

In 1991, petitioner sought post-conviction relief in state court, which was denied by the trial court. That judgment was affirmed by the Tennessee Court of Criminal Appeals, *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995), and the Tennessee Supreme Court denied review, and this Court denied certiorari. *Jones v. Tennessee*, 516 U.S. 1122 (1996).

Petitioner filed a petition for federal habeas corpus review in 1996, challenging both his convictions and the sentences. The district court granted the writ and vacated petitioner's death sentence on petitioner's claim of ineffective assistance of counsel at the sentencing phase; the district court denied relief on all other claims. ***Abdur'Rahman v. Bell***, 999 F. Supp. 1073 (M.D. Tenn. 1998). The court of appeals reversed the judgment vacating petitioner's death sentence but affirmed the judgment in all other respects. ***Abdur'Rahman v. Bell***, 226 F.3d 696 (6th Cir. 2000).

On October 9, 2001, this Court denied certiorari review of the Sixth Circuit's

[1] The trial court sentenced petitioner to two consecutive life terms for the two remaining convictions.

judgment. ***Abdur'Rahman v. Bell***, 122 S.Ct. 386 (2001). On October 10, 2001, petitioner filed in the Sixth Circuit a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings. On November 2, 2001, petitioner filed in the district court a Fed. R. Civ. P. 60(b) motion for relief from the court's 1998 habeas corpus judgment. On November 5, 2001, petitioner filed in this Court a petition for a rehearing of the denial of certiorari.

On November 27, 2001, the district court, concluding that petitioner's Rule 60(b) motion constituted a second or successive petition subject to 28 U.S.C. § 2244(b), transferred the matter to the Sixth Circuit pursuant to 28 U.S.C. § 1631. The district court also denied a certificate of appealability. On November 30, 2001, petitioner filed a notice of appeal from the district court's action on the Rule 60(b) motion. On December 3, 2001, this Court denied the petition for rehearing. ***Abdur'Rahman v. Bell***, 122 S.Ct. 661.

On December 6, 2001, petitioner filed in the Sixth Circuit a motion requesting 1) a certificate of appealability from the district court's action on his Rule 60(b) motion; 2) *en banc* consideration of his appeal therefrom; and 3) consolidation with the previously filed motion to withhold the mandate and to rehear or remand. In the meantime, on January 15, 2002, the Tennessee Supreme Court set a date of April 10, 2002, for execution of petitioner's sentence.

On January 18, 2002, a panel of the Sixth Circuit denied the application for a

certificate of appealability. In that order, the court construed petitioner's Rule 60(b) motion as a second habeas corpus petition, subject to 28 U.S.C. § 2244(b). On February 11, 2002, the court denied all of petitioner's pending motions, including his application for leave to file a second habeas corpus petition and his motion for rehearing or remand of his original appeal.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE FIRST QUESTION PRESENTED BY PETITIONER.

Petitioner seeks this Court's review, as an exercise of its certiorari jurisdiction, of the Sixth Circuit's February 11, 2002, denial of petitioner's application for leave to file a second or successive habeas corpus petition. This denial, however, "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E); *see Felker v. Turpin*, 518 U.S. 651, 661, 665 (1996)(certiorari petition to review denial of successive habeas application dismissed for want of jurisdiction); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-2 (1998)("If the Court of Appeals in this case had granted respondent leave to file a second or successive application, then we would be without jurisdiction to consider petitioners' petition and would have to dismiss the writ"). Therefore, this Court is without jurisdiction to review the first question presented by the petition.

Nevertheless, petitioner suggests that this Court can review the Sixth Circuit's

"predicate determination, embodied in a final order in this case as set forth in the February 11, 2002 Order" that his Rule 60(b) motion is a second or successive application.[2] But adopting petitioner's distinction here would eviscerate the restrictions set forth in 28 U.S.C. § 2244(b). Under petitioner's theory, a habeas petitioner could always seek certiorari review by merely characterizing his successive habeas application as a Rule 60(b) motion. As petitioner himself points out, a court should not be bound by the captions a litigant uses to style his pleadings, but should look to the relief that the litigant seeks. *See United States v. Woods*, 169 F.3d 1077, 1079 (7th Cir. 1999)(captions do not matter; the court must determine the substance of the motion). The determination of whether a pleading in a given habeas case constitutes a second or successive application is an implicit and necessary component of any decision by a court of appeals to grant or deny such an application; when, as here, the court determines that the pleading is a successive application and applies the provisions of § 2244(b) to it, that decision may not be the subject of a petition for a writ of certiorari.

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[2] Petition for Writ of Certiorari ("Petition"), p. 1 n. 1. Respondent notes, however, that petitioner further states that it does not matter whether petitioner's pleading was a Rule 60(b) motion or an entirely separate habeas application, insisting that he was entitled to seek relief in either event "because [the claims raised therein] had been raised before but never decided on their merits." *Id.*, p. 23 n. 11. Clearly, then, petitioner seeks this Court's certiorari review of the Sixth Circuit's denial of his effort to reassert claims from his original petition — review that is prohibited by the statute.

II. NO COMPELLING REASONS EXIST TO WARRANT CERTIORARI REVIEW OF THE SIXTH CIRCUIT'S DECISION CONSTRUING PETITIONER'S POST-JUDGMENT MOTION AS A SUCCESSIVE HABEAS CORPUS PETITION.

A. *The Decision Below Does Not Create a Categorical Rule Establishing That Every Rule 60(b) Motion in a Habeas Case Constitutes a Second or Successive Habeas Application*.

Even assuming, for the purpose of argument, that this Court has jurisdiction to review the Sixth Circuit's determination that petitioner's Rule 60(b) motion constitutes a successive habeas application, such review is unwarranted. In his bid for this Court's review, petitioner contends that the Sixth Circuit applied a "categorical rule that every Rule 60(b) Motion (sic) filed by a habeas petitioner constitutes a 'second or successive' habeas application."[3] In the unpublished order in question,[4] however, the Sixth Circuit concluded only that "[w]e consider that this [petitioner's Rule 60(b)motion] is the equivalent of a successive habeas corpus petition."[5] The court relied on *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996), in which the court stated,

> We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to a cause and prejudice analysis.

Id. at 1335 (citing *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992); *Lindsey v.*

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[3] Petition, p. 12.

[4] Only published panel decisions are binding on subsequent panels, 6 Cir.R. 206(c), and the citation of unpublished decisions is disfavored. 6 Cir. R. 28(g).

[5] January 18, 2002, order denying application for certificate of appealability. This order is referred to in the February 11, 2002, order, which is the subject of this petition.

Thigpen, 875 F.2d 1509, 1511-12, 1515 (11th Cir. 1989); *Landano v. Rafferty*, 897 F.2d 661, 668 (3rd Cir. 1990); *Jones v. Murray*, 976 F.2d 169, 172 (4th Cir. 1992); *Clark v. Lewis*, 1 F.3d 814, 825-26 (9th Cir. 1993); *Williams v. Whitley*, 994 F.2d 226, 230 n. 2 1993); *Bonin v. Vasquez*, 999 F.2d 425, 426 (9th Cir. 1993)).

Nowhere in *McQueen*, or in the Sixth Circuit's order in this case, does the court state that *every* Rule 60(b) motion constitutes a second or successive habeas corpus petition, as petitioner alleges. Indeed, while the above-quoted language in *McQueen* may be interpreted in the abstract as a statement of such a rule, this statement itself refers to, and expresses the court's agreement with, decisions from circuits in which petitioner himself asserts that the rule is non-categorical. Moreover, petitioner's characterization of the Sixth Circuit's rule regarding post-judgment motions in habeas corpus actions as "categorical" ignores the court's historical treatment of such motions.

In *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000), *cert. denied*, 531 U.S. 1193 (2001), the Sixth Circuit, sitting *en banc*, addressed a capital habeas petitioner's post-judgment motion to reopen his original habeas corpus petition. In support of that motion, which was filed in the Sixth Circuit, the petitioner alleged the perpetration of a fraud upon the court. While the *en banc* court split evenly on the merits of the motion, the full court unanimously agreed to consider the motion in spite of the restrictions against second or successive habeas corpus petitions. Citing this Court's decision in *Calderon v. Thompson*, 523 U.S. 538, 557 (1998), the full court observed that, precisely

because the post-judgment motion alleged a fraud upon the court, the restrictions imposed by 28 U.S.C. § 2244(b) did not preclude it from acting on the motion. *Workman v. Bell*, 227 F.3d at 335, 341. *See Workman v. Bell*, 245 F.3d 849, 851 (6th Cir. 2001)("[i]n our equally divided opinion denying further relief for the petitioner in *Workman*, 227 F.3d 331, all of the judges agreed that the court can reconsider the petition if there was a fraud upon the court"). *See also Lewis v. Alexander*, 987 F.2d 392, 395 (6th Cir. 1993)(Rule 60(b) motion granted to permit timely appeal where notice of appeal filed late). Clearly, the Sixth Circuit does not treat every post-judgment motion in a habeas corpus action as a second or successive habeas corpus petition.

B. ***The Decision of the Sixth Circuit Does Not Conflict With Decisions of This Court.***

The Sixth Circuit's decision in this case, then, stands for the unremarkable proposition that a post-judgment motion seeking to relitigate claims that were dismissed as procedurally defaulted, and thus barred from federal habeas corpus review, constitutes a successive habeas petition. Despite petitioner's contention that this holding is "totally irreconcilable" with *Calderon v. Thompson*, 523 U.S. 538 (1998), *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), no such conflict exists.

In *Thompson*, this Court observed that a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a successive application for purposes of § 2244(b). "Otherwise, petitioner could evade the bar

against relitigation of claims presented in a prior application." *Id.*, 523 U.S. at 553. *See id.*, 523 U.S. at 569 (Souter, J., dissenting)("All would agree . . . that the *sua sponte* recall of mandates could not be condoned as a mechanism to frustrate the limitations on second and successive habeas petitions"). While petitioner correctly points out that the Court further observed that the underlying basis of the court's action will determine whether such cases are subject to § 2244(b), petitioner misplaces emphasis on the question of whether that court considers "new claims or evidence." This Court's emphasis in *Thompson* was instead focused on whether the court's action was based on matters raised by the successive application, rather than being restricted to matters contained in the original petition. As the *Thompson* Court observed, "had the court [of appeals] considered claims or evidence presented in [the petitioner's] later filings, its action would have been based on a successive application." *Id.*, 523 U.S. at 554. Here, petitioner asked the Sixth Circuit to reconsider his procedurally defaulted claims on the basis of a new state procedural rule — a rule that was promulgated some three years after the district court adjudged the claims defaulted and, therefore, not mentioned in the original habeas petition. Under *Thompson*, any action on petitioner's claims based upon consideration of the new procedural rule would therefore be based on a successive petition, subject to § 2244(b).

Neither is the Sixth Circuit's decision in this case inconsistent with this Court's decisions in *Martinez-Villareal* and *Slack*. In both cases, this Court held that where claims

contained in a first habeas corpus petition are not adjudicated, either because they are not ripe for such adjudication, as in *Martinez-Villareal*, or have not yet been exhausted in state court, as in *Slack*, the reopening or reassertion of such claims at a later time does not constitute a successive habeas petition. Petitioner likens his case to these scenarios, pointing out that, in his case too, several of his claims were not exhausted in state court. But petitioner's case is significantly different. In *Slack*, quoting from its decision in *Martinez-Villareal*, this Court observed,

> [None] of our cases . . . have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, *and who then did exhaust those remedies and returned to federal court*, was by such action filing a successive petition.

Slack, 529 U.S. at 487 (quoting *Martinez-Villareal*, 523 U.S. at 644)(emphasis added). The crucial difference for petitioner is that he filed a habeas corpus petition that included unexhausted claims *that he was no longer able to exhaust*. As a result, petitioner *did receive* an adjudication of these claims — an adjudication that they were procedurally defaulted. Thus, his post-judgment motion is barred from habeas corpus review under § 2244(b).

Petitioner insists that the reassertion of old claims can *never* be construed as a successive petition unless the habeas petitioner received an adjudication on the merits. In support of this argument, petitioner relies on the language in *Thompson* wherein this Court stated that "a prisoner's motion to recall the mandate *on the basis of the merits of the underlying decision* can be regarded as a second or successive application." *Thompson*, 523

U.S. at 553 (emphasis added). But that language cannot be read to imply a requirement that the underlying denial of a habeas claim must have been based on an assessment of the substantive merits of that claim. Simply put, "the merits of a decision" is a different concept than "a decision on the merits."

Furthermore, such a requirement would run afoul of the clear and unambiguous terms of the statute. Under 28 U.S.C. § 2244(b)(1), a claim presented in a second or successive habeas application "that was presented in a prior application" shall be dismissed. There is no requirement that such claims have been previously determined or even, for that matter, previously adjudicated. *See Martinez-Villareal*, 523 U.S. at 650, 646 (Scalia, J., dissenting; Thomas, J., dissenting). Indeed, to subject claims that are barred from a federal court's review due to a petitioner's procedural default, to future relitigation of the merits of that default judgment would frustrate the very purpose of the AEDPA's enactments. In addition, imposing a requirement that the original denial of habeas relief have been on the merits of a claim would ignore the practical reality that a great many claims presented in an original habeas petition are disposed of on the basis of procedural default. Finality interests likewise attach to these judgments, just as they do to those made on the merits. Instead, *Thompson*'s language is properly read to apply to a petitioner's effort to reassert claims that have been previously and finally decided by a federal court and to relitigate the merits of that decision.

C. *Despite Petitioner's Assertion of a Conflict Between the Sixth Circuit's Decision and a Decision of the Second Circuit, Certiorari Review of the Sixth Circuit's Decision Is Unwarranted.*

Seizing upon the 2001 decision of the Second Circuit Court of Appeals in *Rodriguez v. Mitchell*, 252 F.3d 191 (2nd Cir. 2001), petitioner seeks this Court's review of the Sixth Circuit's judgment on the basis of the conflict he asserts it creates. First, despite the language employed by the Second Circuit in *Rodriguez*, no true conflict exists between the actual holding in that case and the Sixth Circuit's decision in this case. To be sure, the Second Circuit in *Rodriguez* purported to "rule that a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition." *Id.*, 252 F.3d at 198. But this statement, and others like it in the court's decision, are dicta. The precise holding of the case is that a Rule 60(b) motion alleging that fraudulent misrepresentations and non-disclosures had been made to the district court during the pendency of the habeas proceedings will not be considered a successive habeas petition subject to § 2244(b). *Id.*, 252 F.3d at 196, 197, 199. As discussed above, such a holding is not at all inconsistent with the Sixth Circuit's treatment of such post-judgment motions; nor is it inconsistent with the Sixth Circuit's decision in this case.

Second, assuming that the dicta in *Rodriguez* epitomizes the stance of the Second Circuit regarding how it would treat all post-judgment motions in habeas cases, that circuit stands alone on this issue. Indeed, the Second Circuit itself recognized in

Rodriguez that it was deviating from "the majority of the circuit courts that have considered the issue," *id.*, 252 F.3d at 199-200; in fact, it appears that the Second Circuit has deviated from the position taken by *every* other circuit court in the land, save the only one that has not considered the question.[6] Furthermore, it is the Second Circuit's statement in *Rodriguez* — that a post-judgment motion under Rule 60(b) can never be construed as a successive habeas petition — and not the decision of the Sixth Circuit in this case, that conflicts with this Court's decision in *Thompson*. Respondent submits that, while any conflict between this statement of the Second Circuit and the rule in other circuits, including the Sixth Circuit, might warrant certiorari review of an appropriate Second Circuit decision in the future, it does not justify an exercise of this Court's discretionary review in this case.

The notion that constitutional claims that are procedurally defaulted and thus barred from federal review may one day become "un-barred" demonstrates the absurdity of the argument that petitioner ultimately seeks to advance — that a state can retroactively alter the historical *fact* that discretionary review by that state's highest court was available at the time of a petitioner's appeal.[7] Furthermore, while petitioner

[6] In *McQueen*, 99 F.3d at 1335, the Sixth Circuit relies on like cases from the Third, Fourth, Fifth, Eighth, Ninth and Eleventh Circuits. *See also Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998). Respondent has been unable to locate any decision of the First Circuit addressing this issue.

[7] *See* Respondent's Brief in Opposition to petitioner's Petition for An Original Writ of Habeas Corpus. *See also Wenger v. Frank*, 266 F.3d 218 (3rd Cir. 2001), *cert.*

contends that the constitutional claims that he seeks to reassert by way of his Rule 60(b) motion are "indisputably substantial,"[8] these are the same claims that petitioner failed to include in his application for discretionary review to the Tennessee Supreme Court during state court proceedings; they are also the same claims for which petitioner declined to seek an appeal of the district court's ruling that they were procedurally defaulted. But now that all other avenues of relief have been exhausted, and petitioner faces a date for execution of his sentence, he seeks to resurrect these claims and place new emphasis upon them. These cannot be the "compelling reasons" for which this Court reserves grants of certiorari review.[9] *See* U.S. Sup. Ct. R. 10.

III. THE SIXTH CIRCUIT DID NOT ABUSE ITS DISCRETION BY DECLINING TO REHEAR OR REMAND TO THE DISTRICT COURT.

Petitioner asks this Court to review the Sixth Circuit's decision to decline to remand his appeal of the denial of his original habeas application. He contends that the Sixth Circuit abused its discretion because it deprived him of the ability to assert his post-judgment challenge to the district court's ruling that his claims were procedurally defaulted. Petitioner's request for certiorari review of this decision is answered simply by the fact that the issue of petitioner's procedural default of these claims was never

denied, No. 01-7852 (Mar. 25, 2002).

[8] Petition, p. 28.

[9] Petitioner's argument that the Sixth Circuit's decision "raises a grave question under the Constitution's Suspension Clause" is vitiated by petitioner's contemporaneous filing of a petition seeking an original writ of habeas corpus from this Court on the basis of these same claims. *See Felker v. Turpin*, 518 U.S. 651, 663-4 (1996).

before the Sixth Circuit because petitioner declined to appeal that ruling of the district court.[10] As the Sixth Circuit observed, "the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default."[11] Respondent submits that it cannot have been an abuse of discretion for the Sixth Circuit to decline to remand for further consideration matters that were never placed before it in the first instance.

[10] *See* petitioner's October 9, 2001, Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings, p. 24.

[11] February 11, 2002, order denying application for leave to file successive habeas application and denying motion for rehearing.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded, by facsimile and first-class mail, postage prepaid, to Thomas C. Goldstein, Goldstein & Howe, P.C., 4607 Ashbury Pl., NW, Washington, D.C., 20016; Bradley A. MacLean, Stites & Harbison PLLC, SunTrust Center, Suite 1800, 424 Church Street, Nashville, Tennessee, 37219-2376; and to William P. Redick, Jr., 810 Broadway, Suite 201, Nashville, Tennessee, 37203, on this the 28th day of March, 2002.

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5

CAPITAL CASE – EXECUTION DATE: 4/10/02 1:00 a.m.

No. 01-9094

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

FILED
APR
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This is a capital case in which the State all but admits a square circuit split on an important and recurring question of federal law, and in which the State's contention that the decision below can be reconciled with this Court's precedents rests on a two-Justice *dissent*. Specifically, there is no question either (i) that (as Respondent *admitted* below) this case would be decided differently under the firm holding of *Rodriguez* v. *Mitchell*, 252 F.3d 191, 194 (CA2 2001), that "a motion under Rule 60(b) to vacate a judgment denying habeas is not the equivalent of a second or successive habeas petition subject to the standards of § 2244(b)," or (ii) that the proper treatment of Rule 60(b) motions can arise in almost *any* habeas proceeding and thus merits review in this Court. In addition, Respondent's reliance on the dissenting views of Justices Scalia and Thomas in *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 645 (1998), boldly ignores the seven-Justice majority's contrary holding that a habeas petitioner's request to "receive an adjudication of his claim" presented in a prior application but never decided "on the merits" does *not* constitute a "second or successive" application. Certiorari accordingly should be granted.

JURISDICTION

There is no merit to Respondent's contention that that this Court is powerless to consider the circuit split over whether and when a Rule 60(b) motion constitutes a "second or successive" habeas application. The AEDPA provision Respondent invokes (Cert. Opp. 4) applies only when a petitioner seeks to make a "prima facie showing" that he is entitled to "an order authorizing the district court to consider" a second or successive application. 28 U.S.C. 2244(b)(3)(A), (C). In that circumstance, the court of appeals' "gatekeeping" determination is unreviewable on certiorari, for the statute provides that "[t]he grant *or* denial of an authorization by a court of appeals to file a second or successive application * * * shall not be the subject of a petition * * * for a writ of certiorari." *Id.* § 2244(b)(3)(E).

Respondent simply refuses to recognize that Petitioner is not seeking, in the terms of the statute, "authorization by a court of appeals to file a second or successive application." He has never requested any such relief.[1] Rather, he is challenging the district court's predicate determination, subsequently adopted by the Sixth Circuit when the case was transferred, that his Rule 60(b) Motion *is* a "second or successive" application. See Pet. App. A2 ("The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas petition, *see McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir 1996), so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gate[keeping] criteria of 28 U.S.C. § 2244(b)."). The characterization of a habeas application as "second or successive" is thus made in the first instance by a district court rather than the court of appeals, which has no gatekeeping role to play.

Nor, of course, is there any merit to Respondent's contention (Cert. Opp. 5) that "the restrictions set forth in 28 U.S.C. § 2244(b)" will be "eviscerate[d]" if this Court is not stripped of the power to grant certiorari to decide whether an application is "second or successive." If this Court determines on certiorari than an application is properly characterized as "second or successive," the Petitioner may not proceed to challenge the court of appeals' determination that the application may not be filed because it fails to make out a prima facie showing under the gatekeeping criteria.

It is instead Respondent's reading that would deprive Section 2244(b)(3) of any rhyme or reason. Assume that a court of appeals finds that a habeas petitioner has made out the necessary

prima facie showing of an entitlement to file a "second or successive" application, but that the district court nonetheless dismisses the application for failure to satisfy the gatekeeping criteria (see 28 U.S.C. 2244(b)(4)). If the court of appeals affirms, the entire case could be brought here on certiorari because the jurisdictional bar applies only to the court of appeals' "prima facie" gatekeeping determination, not any subsequent ruling. See 28 U.S.C. 2244(b)(3)(A), (C). Respondent would have to agree that, in that circumstance, the habeas petitioner could seek certiorari to review whether the application was, in fact, "second or successive." Respondent nonetheless contends that this Court is forbidden from reviewing the *identical* issue when (as in this case) the case never gets past the "prima facie" stage because the petitioner contends he does not present a "second or successive" application and admits he cannot satisfy the gatekeeping criteria. That makes no sense, and there is no reason to believe Congress would have intended such a bizarre result.

In any event, Respondent concedes (Cert. Opp. 14 n.9) that his jurisdictional objection is irrelevant because this Court may grant Petitioner relief pursuant to his request for an Original Writ of Habeas Corpus, No. 01-9095, *In re Abdur'Rahman*.[2]

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[1] Thus, Respondent's assertion (Cert. Opp. 4) that the Sixth Circuit "denied all of petitioner's pending motions, including his application for leave to file a second habeas corpus petition" is totally misleading, as no such application was ever filed.

[2] Two further points raised briefly by Respondent have nothing to do with the questions presented and are easily disposed of. *First*, Respondent's argument (Cert. Opp. 13) that Petitioner would not be entitled to relief under TN Rule 39 is both wrong and also irrelevant for present purposes because that issue would be addressed in the first instance by the lower courts on remand. See Original Pet. Reply 3-8. *Second*, Respondent's suggestion (Cert. Opp. 14) that Petitioner's habeas claims are not "substantial" because he did not appeal their dismissal mixes apples and oranges. The relevant point is that Respondent does *not* dispute that the TN Rule 39 Claims raise very serious allegations of prosecutorial misconduct supported by a strong factual record. See Cert. Pet. 28-29, Pet. App. 11-134. It is furthermore not disputed that Petitioner did not appeal because he *prevailed* in the district court and because the district court's procedural default holding was then unassailable under Sixth Circuit precedent subsequently adopted by this Court during the appellate briefing (see *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999)). Most important for purposes of both of Respondent's arguments, he cannot and does not contend that anything about the procedural history of this case precludes him from invoking TN Rule 39 in a Rule 60(b) Motion if the decision below is reversed.

ARGUMENT

I. Even Accepting Respondent's Mischaracterization Of The Sixth Circuit's Holding, This Case Directly Presents An Important And Intractable Circuit Conflict.

1. According to Respondent (Cert. Opp. 7-8), the Sixth Circuit did not "state that *every* Rule 60(b) motion constitutes a second or successive habeas petition, as petitioner alleges" (emphasis in original), but rather held "that a post-judgment motion seeking to relitigate claims that were dismissed as procedurally defaulted, and thus barred from federal habeas corpus review, constitutes a successive habeas petition." That is simply wrong, and Respondent is baldly contradicting his unambiguous position in the lower courts. Neither Respondent, nor the district court, nor the court of appeals articulated any such rule. Instead, as the Cert. Petition explained (at 8) and Respondent does not dispute, Respondent argued below for a categorical rule that all Rule 60(b) motions are "successive" applications, which the district court adopted, and which the Sixth Circuit in turn expressly embraced.[3] It was *Petitioner* who attempted to argue – in the district court, before the panel, and in a petition for *en banc* review – that Sixth Circuit precedent could be interpreted not to apply a categorical rule, but he was rebuffed at Respondent's urging, at every stage.

Respondent seeks to support his newfound reading of Sixth Circuit precedent with two points, both meritless. *First*, he notes (Cert. Opp. 6-7) that the Sixth Circuit has cited with approval decisions of other circuits that do not apply a categorical rule. But, as Respondent argued below, the actual *decision* of the Sixth Circuit (*McQueen* v. *Scroggy*, 99 F.3d 1302, 1335

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[3] See Resp. Dist. Ct. Br. 3 ("Petitioner cites to *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001), as authority for this Court to entertain a Rule 60(b) motion in a federal habeas proceeding brought by a state prisoner. However, the Sixth Circuit has stated that '[w]e agree with those Circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition.'"); Pet. App. C3 (district court: "In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition."); *id.* A2 (court of appeals: "The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas petition, *see McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), so it

(1996)) announces a categorical standard that all Rule 60(b) motions are second or successive applications, and *McQueen* (erroneously) interprets other circuits as employing the same rule: "We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to a cause and prejudice analysis." If the Sixth Circuit in fact did *not* apply a categorical rule, it would have ruled for Petitioner in this case, where the Rule 60(b) motion relies only on claims that were presented in the initial habeas application but were not decided on the merits for procedural reasons. See also *infra* at 7-8 (explaining conflict with decisions of Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits).

Second, Respondent (Cert. Opp. 7-8) erroneously cites two Sixth Circuit decisions as supposedly eschewing a categorical approach. The first decision – *Workman* v. *Bell*, 227 F.3d 331 (2000) (en banc), *cert. denied*, 531 U.S. 1193 (2001) – involved a request to recall the mandate, *not* a Rule 60(b) motion. The relevant point for present purposes is that two members of the panel in this case wrote in *Workman* that "a post-judgment motion under Fed. R. Civ. P. 60(b) in the district court * * * is a 'second or successive' application for purposes of § 2244(b)." 227 F.3d at 339 (opinion of Siler, J., joined by, *inter alia*, Batchelder, J.). They were willing to recognize an exception only for "the *very limited issue* of a fraud upon the court." *Id.* (emphasis added). See also *Workman* v. *Bell*, 245 F.3d 849, 851 (CA6 2001) (adhering to exception "if there was a fraud upon the court").

The second decision Respondent cites – *Lewis* v. *Alexander*, 987 F.2d 392 (CA6 1993) – was the lead case unsuccessfully cited by *Petitioner* in the Sixth Circuit. See Pet. for Rhg. *En Banc* 10. Respondent baldly contradicts himself by now invoking it as representing binding Sixth Circuit precedent. Petitioner's reliance on *Lewis* was rebuffed below, no doubt, because it

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transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gate[keeping] criteria of 28 U.S.C. § 2244(b).")

predates *McQueen* and furthermore does not address the "second or successive" petition question. Instead, it is one of many cases in which the lower courts have decided Rule 60(b) motions both favorably and unfavorably to habeas petitioners while ignoring simply the "second or successive" issue. As the Cert. Petition explained (at 19), this further inconsistency in the law is an important reason to *grant* certiorari, not to deny review.

2. The further failing of the Certiorari Opposition is that, no matter what the precise scope of the Sixth Circuit's rule, there is a square circuit conflict. Other circuits, including particularly the Second Circuit, manifestly do *not* deem a Rule 60(b) motion that seeks an adjudication of claims previously held procedurally defaulted to be a "second or successive" habeas application.

a. The Second Circuit categorically holds that Rule 60(b) motions are not "second or successive" habeas applications. See *Rodriguez* v. *Mitchell*, 252 F.3d 191 (2001). *Both* Respondent and the district court acknowledged the split below. See Cert. Pet. 8-9. Now faced with review in this Court, Respondent (Cert. Opp. 12) half-heartedly claims for the first time that the Second Circuit's articulation of its rule is "dicta." That is preposterous. As the Cert. Petition made clear, Petitioner is not relying on a passing excerpt from *Rodriguez* that could be distinguished in a later case. Rather, the *Rodriguez* opinion (in which the court of appeals appointed Professor Yackle as counsel) is essentially *devoted* to rejecting the view of other circuits that Rule 60(b) motions "must" or "may" be deemed second or successive applications. For example, the Second Circuit discussed at length its view that Rule 60(b) motions not only have "different objectives" than habeas applications (252 F.3d at 198), but also will often (as in Petitioner's case) rest on grounds that "have nothing to do with the alleged violations of federal rights during the state criminal trial that are asserted as a basis for habeas" (*id.* at 199).

Two other points make clear that the Second Circuit's decision is well considered and firmly entrenched, such that only a ruling by this Court can bring needed uniformity to the law. *First*, as Respondent himself emphasizes (Cert. Opp. 12-13), "the Second Circuit itself recognized in *Rodriguez* that it was deviating from 'the majority of the circuit courts that have considered the issue.'" Particularly important for present purposes, the Second Circuit expressly rejected the Sixth Circuit's *McQueen* precedent by name. See 252 F.3d at 200 n.2. *Second*, the Cert. Petition (at 16 nn.8-9) collected *ten* different district court decisions within the Second Circuit (*none* limited to a claim of "fraud") granting relief to habeas petitioners under Rule 60(b) subsequent to the enactment of AEDPA. There cannot be any reasonable dispute that the Second Circuit's approach is settled.[4]

b. This case also presents a square conflict with the holdings of the Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. See Cert. Pet. 17-18. As explained *supra* at 4-5, Respondent's reliance (Cert. Opp. 7-8) on the fact that that the Sixth Circuit in *McQueen* cited the decisions of those courts with approval is misguided because *McQueen* mistakenly cites them as adopting its categorical rule. The conflict ultimately must be measured not merely by citations but by whether other circuits would deem the Rule 60(b) motion in this case to be a "second or successive" application. They unquestionably would not. The Petition (at 17-18) detailed, and Respondent notably *ignores*, that those courts look to whether the motion seeks to evade the bar to successive applications by (i) raising new claims or evidence, or (ii) relitigating claims that have already been decided on their merits. Neither is true of Petitioner's Rule 60(b) Motion.

[4] The open conflict between the Second Circuit's decision in *Rodriguez* and the Sixth Circuit's published decision in *McQueen* answers Respondent's passing reliance (Cert. Opp. 6) on the fact that the decision below is "unpublished." The fact that the Second Circuit "stands alone" in adopting a categorical rule that Rule 60(b) motions are not "second or successive" applications (*id.* 12) is a reason to *grant* certiorari, not to deny review. If the Second Circuit's rule *is* erroneous, as Respondent submits, then review should be granted to avoid granting a windfall to prisoners in that circuit.

See, *e.g.*, *United States* v. *Rich*, 141 F.3d 550, 553 (CA5 1998) (inquiry is whether motion is "the functional equivalent of a motion under § 2255); *Mathenia* v. *Delo*, 99 F.3d 1476, 1480 (CA8 1996) (motion is successive if it "raised 'grounds identical to grounds heard and decided on the merits in [the petitioner's] previous petition'" (quoting *Sawyer* v. *Whitley*, 505 U.S. 333, 338 (1992))), *cert. denied*, 521 U.S. 1123 (1997).

3. Certiorari is also warranted in light of the great importance of the question presented, which (as the Cert. Petition explained (at 12)) can arise in essentially any Section 2254 or 2255 proceeding. Respondent only emphasizes the point (Cert. Opp. 11): "a great many claims presented in an original habeas petition are disposed of on the basis of procedural default."

II. The Decision Below Conflicts With This Court's Precedents.

Certiorari is also merited because, as the Cert. Petition demonstrated (at 22-24), the decision below is irreconcilable with three of this Court's precedents, which hold that a habeas application is "second or successive" only if it seeks to present new claims or seeks to relitigate claims that have already been decided on the merits. See *Slack* v. *McDaniel*, 529 U.S. 473 (2000); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998); *Calderon* v. *Thompson*, 523 U.S. 538 (1998). Under those decisions, Petitioner's Rule 60(b) motion is permitted because it only seeks a ruling on claims that were presented in his initial habeas petition but were never decided for procedural reasons.

1. Respondent's principal argument (Cert. Opp. 11) is that, under the "second or successive" application provisions of Section 2244(b)(1), "[t]here is no requirement that such claims have been previously determined or even, for that matter, previously adjudicated." But, in what can only regarded as a back-handed effort at candor, Respondent provides a single citation for his reading of the statute: the *dissent* in *Stewart* v. *Martinez-Villareal*. More relevant, Petitioner submits, is the seven-Justice majority, which explicitly *rejected* the state's

arguments that a habeas petitioner "is entitled to only one merits judgment on his federal habeas claim" and that when a petitioner has "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.'" 523 U.S. at 643 (quoting Pet'r Br. 12). The majority instead found dispositive that the claims in question were (as in Petitioner's case) set forth in his initial application. Thus, "there was only one application for habeas relief." *Id.* at 643-44.

Respondent thus ultimately concedes (Cert. Opp. 9-10) that in both *Martinez-Villareal* and *Slack*, "this Court held that where claims contained in a first habeas corpus petition *are not adjudicated*, either because they are not ripe for such adjudication, as in *Martinez-Villareal*, or have not yet been exhausted in state court, as in *Slack*, the reopening or reassertion of such claims at a later time *does not constitute a successive habeas application*" (emphasis added). But Respondent (*id.* at 10) purports to find a "crucial difference" in the fact that Petitioner is "*no longer able to exhaust*" the TN Rule 39 Claims: "As a result, petitioner *did receive* an adjudication of these claims – an adjudication that they were procedurally defaulted" (emphasis in original).

Respondent's purported distinction between the exhaustion and procedural default doctrines is totally illusory. The TN Rule 39 Claims were "adjudicated" in this case only in the same sense that the habeas petitioners' claims in *Martinez-Villareal* and *Slack* were "adjudicated": the district court entered a judgment that disposed of those claims but, for procedural reasons, refused to consider their substance. The relevant point is that the TN Rule 39 Claims were not adjudicated "*on the merits*," and Respondent cannot and does not contend otherwise. As the Petition explained (at 5), and Respondent ignores, the district court in this case

held that "because Petitioner has no remedy currently available in state court, these claims are procedurally defaulted" and refused to consider them.[5]

2. Nor is there any merit to Respondent's contentions (Cert. Opp. 9) that *Calderon* v. *Thompson* stands for the proposition that an application which raises new "matters" is "second or successive," and that Petitioner's Rule 60(b) Motion raises new "matters" because it invokes TN Rule 39, which was "not mentioned in the original habeas petition." *Calderon* holds that "new evidence and claims" (523 U.S. at 548), not "*matters*," would give rise to a "second or successive application." Thus, in *Martinez-Villareal* and *Slack*, this Court found dispositive the fact that the "claims" for relief were set forth in the petitioners' initial habeas applications, notwithstanding that the events establishing ripeness and exhaustion in those cases were subsequent "matters" that, by definition, were not set forth in the initial applications. Indeed, Respondent has it precisely backwards: *Calderon* clearly holds that the motion to recall the mandate in that case was *not* successive despite the Ninth Circuit's "consideration of matters presented in a later filing." *Id.* at 554.

III. Certiorari Is Warranted As To Question 2.

Respondent completely fails to appreciate the important reasons for granting certiorari on the second question presented by the Cert. Petition. If this Court agrees with Respondent on Question One that a Rule 60(b) motion is a prohibited "second or successive" application, its decision very likely will turn on the unique "finality" interest that attaches to a judgment in the habeas corpus context. That decision, however, would leave unresolved the proper treatment of

[5] Respondent's failure to acknowledge that the TN Rule 39 Claims were never addressed on the merits pervades the Cert. Opposition. Thus, Respondent contends (Cert. Opp. 11) that "to subject claims that are barred from a federal court's review due to a petitioner's procedural default, to future *relitigation of the merits* of that default judgment would frustrate the very purpose of the AEDPA's enactments" (emphasis added). And Respondent contends (*id.*) that *Calderon* v. *Thompson* bars the Rule 60(b) Motion because it holds that an application is "second or successive" if the petitioner makes an "effort to reassert claims have been previously and finally decided by a federal court and to *relitigate the merits* of that decision" (emphasis added).

cases like this one in which the Petitioner seeks relief *before* finality attaches because the case is pending on appeal. The second question seeks to provide needed guidance on that issue, as well as a complete and fair disposition of this case.[6]

Respondent's sole argument against review (Cert. Opp. 15) is that "petitioner's procedural default of [the TN Rule 39 Claims] was never before the Sixth Circuit because petitioner declined to appeal that ruling of the district court." That argument ignores the context of habeas litigation generally, and this case particularly.[7] In ordinary civil litigation, it often would be entirely unnecessary for a court of appeals to remand in light of an intervening development, because relief under Rule 60(b) is available to reopen the judgment. Here, by contrast, Petitioner is subject to execution because the Sixth Circuit held that there was *no* procedural vehicle available in the district court for Petitioner to secure an adjudication of his claims. Because a remand was the *only* means to have those claims addressed on the merits, the failure to grant that relief manifestly was an "abuse of discretion."

IV. The Case Should Be Held Pending The Disposition Of *Bell* v. *Cone*.

Contemporaneously, Petitioner is filing a Supplement in light of the oral argument in No. 01-400, *Bell* v. *Cone* (Mar. 25, 2002) to add an additional question presented. As explained in the Supplement, if a remand is warranted in light of *Bell*, an appropriate order should be entered. Otherwise, plenary review should be granted as to the first two questions presented by this Petition.

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[6] In this case, no adverse judgment was entered against Petitioner *at all* until February 11, 2002, when the Sixth Circuit issued its mandate.

[7] Respondent cannot and does not contend that Petitioner, who *prevailed* in the district court, waived the TN Rule 39 Claims by not filing what would have been a frivolous appeal in light of then-binding precedent. See *supra* at 3 n.2. Any such assertion by Respondent of "waiver," moreover, would have been incredible, because the Sixth Circuit in this case reinstated Petitioner's death sentence *sua sponte* and without briefing or argument on an argument that Respondent did not appeal, and Respondent has therefore vigorously argued throughout the case that no waiver may be found when the interests of justice would be furthered by considering an issue. See Cert. Pet. 6.

CONCLUSION

This Court should grant a stay of execution and hold this Petition pending the disposition of No. 01-400, *Bell* v. *Cone*. If no remand is appropriate in light of *Bell*, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(6)

Nos. 01-9094 & -9095

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Abu-Ali Abdur'Rahman,

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Ricky Bell,

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In re Abu-Ali Abdur'Rahman,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Petitioner Abu-Ali Abdur'Rahman ("Abdur'Rahman") respectfully files this Supplemental Brief to his Petition for a Writ of Certiorari (No. 01-9094) ("the Certiorari Petition") and Petition for an Original Writ of Habeas Corpus and For Other Extraordinary Relief (No. 01-9095) ("the Original Petition") in light of the oral argument in No. 01-400, *Bell* v. *Cone* (argued Mar. 25, 2002). Specifically, Petitioner files this Supplement to add as a further question presented:

> Whether the judgments in this case should be vacated and the case remanded for further consideration in light of No. 01-400, *Bell* v. *Cone*.

The Petition for a Writ of Certiorari seeks review of judgments issued on February 11, 2002 by the United States Court of Appeals for the Sixth Circuit. The ninety-day period to seek certiorari accordingly has not expired, and a supplemental brief is in order.[1]

The question raised by this Supplement, which relates to the performance of Petitioner's counsel in the capital sentencing proceedings, is properly before this Court. On federal habeas, the district court found a grievous failure by Petitioner's counsel to present *any* of the abundant available mitigating evidence at sentencing. See Pet. App. E3. A divided panel of the Sixth Circuit *sua sponte* reversed without briefing or argument (see *id.* F21) but stayed its mandate. Petitioner sought certiorari, including with respect to the question "[w]hether the panel majority's prejudice analysis was erroneous." Pet. i. Respondent opposed review principally on the ground that the case was fact-bound, and this Court denied certiorari (No. 00-1742, 122 S. Ct. 368 (2001)) and rehearing (No. 00-1742, 122 S. Ct. 661 (2001)). Petitioner immediately sought a further stay of the mandate in the Sixth Circuit and rehearing in that court. See Pet. App. H1-H27. After extended consideration, the court of appeals denied rehearing and issued its mandate. See *id.* B1-B2. Petitioner's Certiorari Petition (No. 01-9094) (including particularly Question 2) properly seeks review of the Sixth Circuit's order denying rehearing. See Cert. Pet. 1-2.

Even if this Court lacked jurisdiction to grant certiorari to review the court of appeals' specific Order denying rehearing after this Court's denial of certiorari, the further question raised by this Supplement would be properly presented. The denial of certiorari does not preclude Petitioner from raising the same issues in a later petition in the same case. STERN *ET AL.*, *supra*, § 4.18, at 198 (collecting cases). Thus, in his Petition for Certiorari from the Sixth Circuit's decision denying him relief under Rule 60(b), Petitioner may properly raise again the ineffective assistance of counsel question raised by his prior Petition for Certiorari.[2]

BACKGROUND

1. The district court in this case determined that Petitioner's trial counsel had been grossly ineffective at sentencing. Specifically, the district court – based on the extensive factual record compiled there – found that Petitioner had been grossly prejudiced by his counsel's failure to develop and introduce evidence regarding five different classes of mitigating evidence,[3] as well as the mitigating circumstances surrounding the prior homicide invoked by the prosecution as the principal aggravator supporting the death penalty. Pet. App. E47-E53. The district court emphasized that Petitioner's case was not one in which "counsel collected and put on the significant

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[1] Alternatively, this Supplemental Brief could be deemed a motion for leave to amend the petitions. When, as in this case, the ninety-day period to seek certiorari has not expired, this Court's practice has been to grant leave to amend liberally. See ROBERT L. STERN *ET AL.*, SUPREME COURT PRACTICE § 6.27, at 349 (7th ed. 1993); see also, *e.g.*, *Paradies* v. *United States*, 520 U.S. 1238 (1997) (granting leave to amend). No deadline, of course, applies to the Original Petition. The Original Petition (at 1-2) explains that it is filed "protectively" in the event this Court determines (i) that it lacks jurisdiction over the Certiorari Petition, or (ii) that Petitioner is not entitled to relief under the Certiorari Petition. Petitioner's addition of the question relating to *Bell* v. *Cone* to the Original Petition is similarly protective.

[2] Even if the question technically was not presented by the judgments before this Court, Petitioner would be entitled to relief pursuant to the Original Petition. See *supra* n.1.

[3] The district court found that jurors had been deprived of any evidence of: (i) the vicious abuse Petitioner suffered as a child; (ii) Petitioner's exceedingly dysfunctional upbringing as a result of his family's history of mental illness; (iii) Petitioner's own substantial mental illness; (iv) Petitioner's good character and contributions to society; and (v) the mitigating circumstances of the crime itself. Pet. App. E41-E56.

mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence – none – being offered to the jury despite its availability and abundance. * * * This is not a case of harmless error." Pet. App. E56-E57.

The district court accordingly vacated Petitioner's death sentence and remanded for resentencing.

2. Respondent, recognizing that the district court's factual findings were unassailable, appealed only the district court's determination to develop a factual record. The Sixth Circuit *rejected* that argument. See Pet. App. F12, F15, F17. But two judges of the panel *sua sponte* and without any briefing or oral argument reversed the district court's factual determination that the grievous failures of Petitioner's counsel prejudiced him at sentencing. Ignoring the many issues raised by the district court's decision, the majority set forth its *entire* prejudice analysis as follows:

> Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death.

Id. F21.

ARGUMENT

1. Subsequent to the filing of the instant Certiorari Petition and Original Petition on March 18, it has become apparent that the judgment in this case may be profoundly affected by this Court's decision in No. 01-400, *Bell* v. *Cone* (argued March 25). In light of the oral argument, it is apparent

that two possible outcomes in that case would merit a GVR Order here.[4] First, the Court could affirm the court of appeals' judgment that a presumption of prejudice applies when counsel fails to present any substantial arguments at sentencing. Second, the Court could explicate the proper inquiry for adjudicating claims of prejudice from ineffective assistance at capital sentencing.

In either circumstance, further consideration of this case by the court of appeals would be warranted. Here, as in *Mickens* v. *Taylor* (No. 00-9285, decided Mar. 27, 2002), the district court's factual determinations, made after "an evidentiary hearing" and reflected in "a thorough opinion," turn on important "credibility judgments." Slip op. at 1 (Kennedy, J., concurring). The district court made extensive and specific findings regarding the extent to which Petitioner's trial counsel had been ineffective at sentencing (Pet. App. E37-E54), as well as the effect that the "abundant" mitigating evidence not presented at trial would have had on the jury (*id.* E54-E57). In light of the district court's findings, it is uncontested that Petitioner's state trial counsel had not made a strategic choice that they would not investigate possibly mitigating evidence or present witnesses, but – as the counsel themselves acknowledged to the district court – simply failed to do so. *Id.* E42-E43. As the district court found, the pretrial investigation by Petitioner's counsel was "wholly inadequate" insofar as they

- failed to obtain files regarding Petitioner's case from the attorney who had previously represented Petitioner, even though that attorney had "suggested that [Petitioner's counsel] do so" (Pet. App. E40);
- "failed to request Petitioner's extensive mental health records, or his educational, prison, or military records" (*id.*);
- failed to respond to a request from state mental health institute for background information to be used in its psychiatric evaluation of Petitioner (*id.*);
- failed to file (notwithstanding that they had drafted) a motion requesting that the state trial

[4] It is not possible to cite specific exchanges from the oral argument because a transcript is not yet available.

court declare Petitioner indigent and approve funds for investigative or expert services (*id.* E41);

- failed to "consult or hire a mental health expert to perform an independent mental evaluation of [Petitioner]" (*id.*);
- failed to introduce *any* of the information from the state mental health institute's records regarding Petitioner's background or mental health history (*id.*);
- failed to investigate the nature of Petitioner's prior convictions (*id.* E42); and
- failed to contact Petitioner's brother, half-sister, or former fiancée, much less arrange for them to testify at sentencing (*id.* E41-E42).

Further, the district court determined that witnesses such as Petitioner's sister and former fiancée, both of whom testified at Petitioner's federal habeas hearing, and who would have been available to testify at Petitioner's trial, were "extremely credible" and would have presented "compelling" testimony. Pet. App. E47, E51-52. The district court acknowledged that "there was also a considerable amount of negative evidence" – including aspects of Petitioner's criminal, mental health, and educational records – "that the prosecution could have introduced during the sentencing hearing" to rebut the mitigating evidence that constitutionally effective counsel would have introduced. *Id.* E55-E56. Despite the existence of this potentially negative evidence, however, the district court concluded that Petitioner had nonetheless been prejudiced by his counsel's failure to introduce mitigating evidence: "[T]he court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty." *Id.* E56.

Thus, the circumstances of Petitioner's case contrast markedly with those of *Bell* v. *Cone*, in which respondent's trial counsel failed to present any direct mitigating evidence at sentencing but credibly explained that he had done so for strategic reasons. First, Cone's trial counsel had presented, and the jury was charged to consider during its sentencing deliberations, mitigating evidence during the guilt phase, 243 F.3d 961, 978 (CA6 2001), as part of Cone's insanity defense (No. 01-400, State

Br. 4). This mitigating evidence included testimony by two expert witnesses: a clinical psychologist, who testified that Cone suffered from both a substance-abuse disorder and a post-traumatic stress disorder (*id.*), and a neuropharmacologist, who testified regarding Cone's history of drug abuse (*id.* 5). During the guilt phase, the jury also heard testimony from Cone's mother regarding the effect on Cone of his service in Vietnam. *Id.* 5.

During his opening statement at sentencing, Cone's trial counsel specifically argued that the mitigating evidence presented during the guilt phase supported the application of three statutory mitigating circumstances and non-statutory mitigating factors. No. 01-400, State Br. 7. Further, although he did not directly present any evidence during the sentencing phase, Cone's counsel did manage – during the cross-examination of a witness for the state – to elicit testimony that Cone had been awarded a Bronze Star while serving in the U.S. Army. *Id.* 8.[5] Unlike Petitioner's case, in which his trial counsel's pretrial investigation was "wholly inadequate" (Pet. App. E40), in *Cone*,

> the Tennessee Court of Criminal Appeals specifically found that Cone's trial counsel had
> made a diligent and thorough investigation of the facts and the law. Although the appellant was without funds, trial counsel was able to procure a defense team composed of himself, a research expert, medical experts, and an investigator. No stone was left unturned in the preparation of the appellant's defense. Trial counsel was very conscientious in representing the appellant and placed much thought and effort into the tactical aspects of this case.

Id. 12.

Further, in this case, the district court's thorough evaluation of the extent to which Petitioner's trial counsel was ineffective, and the consequence of that ineffective assistance on Petitioner's sentence, stands in sharp contrast to the court of appeals' subsequent evaluation of the same issue. The district court properly emphasized the importance of "a broad inquiry into all relevant mitigating

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[5] Thus, regardless of the wisdom of the decision by Cone's trial counsel not to present direct mitigating evidence during sentencing, Cone's case – unlike that of Petitioner – was *not* a case in which "no mitigating evidence * * * [was] offered to the jury." Pet. App. E56.

evidence to allow an individualized determination" of the appropriateness of the death penalty. Pet. App. E45-E46. Thus, to determine whether Petitioner had been prejudiced at sentencing, the district court considered numerous factors, including – in some detail – all of the "abundant" mitigating evidence that was not presented at Petitioner's trial. *Id.* E47-E53. Based on this evidence, the district court concluded that, even when the potentially "negative" aspects of that evidence were taken into account, Petitioner had been prejudiced by the ineffective assistance of his counsel at sentencing: "It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution." *Id.* E56.

Unlike the district court, however, the Sixth Circuit majority's discussion of the prejudice that accrued from the failure of Petitioner's trial counsel to present mitigating evidence – again, an issue that the panel majority raised *sua sponte* – was, at best, cursory. The majority eschewed any analysis of the "abundant" mitigating evidence, much less the constitutional requirement, emphasized by the district court, that a sentencer conduct a broad inquiry into *all* relevant mitigating evidence (Pet. App. E45-E46). Rather, the panel majority reasoned only that Petitioner had not been prejudiced because the mitigating evidence on which district court relied "seem[ed] to merely supplement the factual findings made by the post-conviction trial court" and, discussed above, also contained "harmful information." *Id.* F21.

2. A remand in this case for further consideration in light of *Bell* v. *Cone* would, for the time being, obviate the need for review of the two questions presented by the Certiorari Petition prior to this Supplement (which relate to the promulgation of Tennessee Supreme Court Rule 39). A determination by the Sixth Circuit based on *Bell* that Petitioner was in fact prejudiced in sentencing would reinstate the district court's order remanding this case to the state courts for resentencing. If the court of appeals instead adheres to its prejudice determination, Petitioner would be entitled to seek certiorari once again as to the questions relating to TN Rule 39.

3. This Court's prudential decision to deny Petitioner's previous Petition for Certiorari does not, of course, militate against holding this case and, if appropriate, remanding to the court of appeals in light of *Bell* v. *Cone*. This Court "must lay down rules that can be followed in the innumerable cases we are unable to review" (*Mickens* v. *Taylor*, *supra*, Slip op. at 4 n.1), and it consistently vacates and remands cases that would not otherwise merit plenary review.

CONCLUSION

For the foregoing reasons, this case should be held pending the disposition of No. 01-400, *Bell* v. *Cone*. In the event the Court's decision in *Bell* warrants a remand in this case, the Court should enter an Order to that effect. If no remand is warranted, the Certiorari Petition should be granted as to the first two questions it presents.

Respectfully submitted,

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April 1, 2002

(1)

Supreme Court, U.S
FILED
JUL 10 2002
CLERK

No. 01-9094

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

RICKY BELL,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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Petition for Certiorari filed March 19, 2002
Certiorari Granted April 22, 2002

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
(NASHVILLE)

[Filed 4/23/96]

CIVIL DOCKET FOR CASE #: 96-CV-380

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

RICKY BELL,

Respondent.

DOCKET ENTRIES

DATE	NO	PROCEEDINGS
4/23/96	1	PETITION FOR WRIT OF HABEAS CORPUS - DEATH ROW with attachments. Various mtns included in petition, to be docketed separately. (ks) [Entry date 04/25/96]
12/2/96	42	AMENDED PETITION FOR WRIT OF HABEAS CORPUS (exhibits A-E attached) (ts) [Entry date 12/03/96]
1/31/97	44	ANSWER by respondent Ricky Bell to petition for writ of habeas corpus [42-1], to [1-1] (tlc) [Entry date 02/03/97]
6/10/97	54	MOTION by respondent Ricky Bell for summary judgment (tlc) [Entry date 06/11/97]

DATE	NO	PROCEEDINGS
6/10/97	55	MEMORANDUM by respondent Ricky Bell in support of motion for summary judgment [54-1] (tlc) [Entry date 06/11/97]
6/10/97	57	STATEMENT of material facts by respondent Ricky Bell in support of motion for summary judgment [54-1] (tlc) [Entry date 06/11/97]
10/10/97	85	SECOND MOTION by respondent Ricky Bell for summary judgment (tlc) [Entry date 10/14/97]
10/10/97	86	MEMORANDUM by respondent Ricky Bell in support of motion for summary judgment [85-1] (tlc) [Entry date 10/14/97]
10/10/97	87	STATEMENT of material facts by respondent Ricky Bell in support of second motion for summary judgment [85-1] (tlc) [Entry date 10/14/97]
10/15/97	88	FIRST MOTION by petitioner for partial summary judgment (tlc) [Entry date 10/17/97]
10/15/97	89	MEMORANDUM by petitioner in support of motion for partial summary judgment [88-1]; w/attachments 3-4 and attached hypnosis video (tlc) [Entry date 10/17/97]
10/15/97	90	MOTION by petitioner to strike precedural defenses (tlc) [Entry date 10/17/97]

DATE	NO	PROCEEDINGS
10/15/97	91	RESPONSE by petitioner to deft's first motion for summary judgment [54-1]; also included in this document is the petitioner's memorandum in support of motion to strike procedural defenses, DE #90 (tlc) [Entry date 10/17/97]
10/15/97	91	MEMORANDUM by petitioner in support of motion to strike procedural defenses response [91-1] (filed as part of petitioner's response to respondent's first motion for partial summary judgment) (tlc) [Entry date 10/17/97]
10/15/97	92	APPENDICES filed by petitioner re petitioner's responses to respondent's first motion for partial summary judgment [91-1], & petitioner's memorandum in support of motion to strike procedural defenses [91-1]; w/attachments 1 - 11 (tlc)[Entry date 10/17/97]
10/20/97	99	AMENDMENT to [89-1] petitioner's memorandum of fact and law in support of the first motion for a partial summary judgment (tlc) [Entry date 10/21/97]
10/20/97	100	APPENDIX of TN cases cited in support of petitioner's response to respondent's first motion for partial summary judgment and petitioner's memorandum in support of motion to strike procedural defenses; submitted by petitioner re [91-1] (tlc) [Entry date 10/21/97]

DATE	NO	PROCEEDINGS
11/10/97	105	REPLY by respondent to petitioner's response to respondent's first motion for summary judgment [54-1]; response to petitioner's motion to strike also filed as part of this document; w/attachments (tlc) [Entry date 11/12/97]
11/10/97	105	RESPONSE by respondent to petitioner's motion to strike precedural defenses [90-1]; filed as part of respondent's reply to petitioner's response to respondent's first motion for partial summary judgment; w/attachments (tlc) [Entry date 11/12/97]
12/5/97	112	RESPONSE by respondent to motion for partial summary judgment [88-1] (db)
12/5/97	113	MEMORANDUM in RESPONSE by petitioner to motion for summary judgment [85-1], to motion for summary judgment [54-1] (db)
12/5/97	114	EXHIBITS in support of mtn response #113 (db)
12/31/97	118	REPLY by petitioner Abu-Ali Abdur'Rahman to response to petitioner's first motion for partial summary judgment [88-1] (tlc) [Entry date 01/05/98]
12/31/97	119	APPENDIX filed by petitioner Abu-Ali Abdur'Rahman re reply [118-1]; w/attached exbibits A - F (tlc) [Entry date 01/05/98]

DATE	NO	PROCEEDINGS
1/21/98	124	ORDER by Judge Todd J. Campbell denying petitioner's motion for partial summary judgment [88-1] (cc: all counsel) (EOD 1/21/98) (tlc)
1/26/98	134	ORDER by Judge Todd J. Campbell denying petitioner's motion to strike precedural defenses [90-1] & denying respondent's first motion for summary judgment [54-1] for reasons as set forth in accompanying memorandum (cc: all counsel) (EOD 1/26/98) (tlc)
1/27/98	137	MOTION by petitioner for reconsideration of ruling on petitioner's first motion for partial summary judgment (tlc)
1/27/98	138	RESPONSE by petitioner to the respondent's procedural defenses (tlc)
1/27/98	139	ORDER by Judge Todd J. Campbell denying petitioner's motion for reconsideration of ruling on petitioner's first motion for partial summary judgment [137-1] (cc: all counsel) (EOD 1/28/98) (tlc) [Entry date 01/28/98]
4/8/98	205	MEMORANDUM OF THE COURT (cc: all counsel) (EOD 4/8/98) (tlc)

DATE	NO	PROCEEDINGS
4/8/98	206	ORDER by Judge Todd J. Campbell granting petitioner's habeas corpus petition [1-1] to the extent the Court vacates the Petitioner's sentence of death; remanding case to State of Tennessee for further proceedings not inconsistent w/this opinion; petitioner shall remain incarcerated as described in the memorandum (cc: all counsel) (EOD 4/8/98) (tlc)
5/7/98	207	NOTICE OF APPEAL by respondent Ricky Bell from Dist. Court decision [206-2] (mg) [Entry date 05/08/98]
5/7/98	212	RECEIVED filing fee and forwarded to 6th CCA, rcpt #63194 (mg) [Entry date 05/11/98]
5/8/98	210	NOTICE OF APPEAL by petitioner from Dist. Court decision [206-2] (mg)
5/8/98	211	MOTION by petitioner for a certificate of probable cause (mg)
5/8/98	--	PROPOSED Order for a certificate of probable cause (mg)
6/4/98	213	RESPONSE in opposition by respondent to motion for a certificate of probable cause [211-1] (mg) [Entry date 06/05/98]
6/9/98	216	ORDER by Judge Todd J. Campbell granting motion for a certificate of probable cause [211-1], granting motion to stay pending appeal [208-1] (cc: all counsel, 6C) EOD 6/9/98 (mg)

DATE	NO	PROCEEDINGS
11/6/98	--	SR Record on Appeal sent to 6th CCA re [210-1] (mg)
11/6/98	--	SR Record on Appeal sent to 6th CCA re [207-1] (mg)
11/30/98	223	NOTIFICATION by 6th CCA of Appellate Docket Number 98-6569 (mg) [Entry date 12/01/98]
11/30/98	224	NOTIFICATION by 6th CCA of Appellate Docket Number 98-6568 (mg) [Entry date 12/01/98]
9/15/00	225	INFORMATION COPY filed 9/13/00 from 6th CCA: The district court's finding of prejudice at the sentencing stage is REVERSED and the jgm granting the petition for a writ of habeas corpus as to petitioner's death sentence is VACATED. The district court's jgm denying the petition for a writ of hapeas corpus as to petitioner's conviction is AFFIRMED. (mg) [Entry date 09/18/00]
9/15/00	226	JUDGMENT by 6CCA: It is ORDERED that the district court's finding of prejudice at the sentencing state is REVERSED; the district court's jgm granting the petition for a writ of habeas corpus as to petitioner Raman's death sentence is VACATED; The district court's jgm denying the petition for a writ of habeas corus as to petitioner's conviction is AFFIRMED. (mg) [Entry date 09/18/00] [Edit date 01/22/01]

DATE	NO	PROCEEDINGS
3/15/01	--	RECORD on appeal returned from 6th CCA re appeal [225-1] (mg)
3/19/01	236	LETTER by Supreme Court of the U.S. extending to file petiton for a writ of cert up to 4/21/01 (mg) [Entry date 05/08/01]
4/30/01	233	LETTER by Supreme Court of the U.S.: time extended to 5/11/01 within which to file a petition for a writ of cert (mg) [Entry date 05/01/01]
5/7/01	237	LETTER by the Supreme Court of the U.S. extending time to file petition for a writ of cert up to 5/21/01 (mg) [Entry date 05/08/01]
5/31/01	240	ORDER by Judge Todd J. Campbell: the Court is in receipt of a petition for writ of certiorari with an accompanying letter from William P. Redick, Jr. dated 5/26/01; the Clerk is directed to file the petition and the letter as part of the record in this case (cc: all counsel) EOD 6/1/01 (vm) [Entry date 06/01/01]
6/1/01	241	LETTER dated 5/26/01, from William P. Redick, Jr. re writ of certiorari being filed w/the Supreme Court on 5/21/01 (vm)
6/1/01	242	PETITION FOR WRIT OF CERTIORARI (copy) by petitioner Abu-Ali Abdur'Rahman (vm)
6/11/01	243	NOTICE by Supreme Court of the U.S. of filing of petition for writ of cert on 5/21/01. (mg) [Entry date 06/12/01]

DATE	NO	PROCEEDINGS
10/9/01	246	MOTION by petitioner Abu-Ali Abdur'Rahman for expediated status conference (w/proposed order) (vm)
10/9/01	247	ORDER by Judge Todd J. Campbell granting motion for expediated status conference [246-1] Status conference set for 9:00 10/10/01 (cc: all counsel) EOD 10/09/01 (mg) [Edit date 10/10/01]
10/10/01	248	CLERK'S RESUME Status conference held 10/10/01 Petitioner felt it necessary to discuss possible future proceedings in this case. Order to enter; C/R: Jim Spence (mg) [Entry date 10/11/01]
10/19/01	251	ORDER by the Supreme Court of the U.S. denying motion of respondent to strike portions of the brief as amici curiae, of the National Mental Health Assoc, et al; denying petition for a writ of cert. (mg) [Entry date 10/23/01]
11/2/01	253	STATUS REPORT dated 11/2/01 by petitioner (with attacments: Appendix 1-9) (mg) [Entry date 11/05/01]
11/2/01	254	MOTION by petitioner for relief with Exhs A & B attached (mg) [Entry date 11/05/01]
11/2/01	255	MEMORANDUM by petitioner in support of motion for relief [254-1] (1 vol, includes attachments A-E) (mg) [Entry date 11/05/01]
11/2/01	256	NOTICE by petitioner of filing juror affidavits (mg) [Entry date 11/05/01]

DATE	NO	PROCEEDINGS
11/2/01	257	AFFIDAVIT of Bonnie M. Meyer re [254-1] (mg) [Entry date 11/05/01]
11/2/01	258	AFFIDAVIT of Alice Stoddard re [254-1] (mg) [Entry date 11/05/01]
11/2/01	259	AFFIDAVIT of Jimmy Swarner re [254-1] (mg) [Entry date 11/05/01]
11/2/01	260	AFFIDAVIT of Scarlett McAllister Smith re [254-1] (mg) [Entry date 11/05/01]
11/2/01	261	AFFIDAVIT of Yolanda Howard re [254-1] (mg) [Entry date 11/05/01]
11/2/01	262	UNNOTARIZED AFFIDAVIT of Loretta L. Gallaway Simpson re [254-1] (mg) [Entry date 11/05/01]
11/2/01	263	UNNOTARIZD AFFIDAVIT of Jury Forman (name not legible) re [254-1] (mg) [Entry date 11/05/01]
11/2/01	264	AFFIDAVIT of James D. Wimberly re [254-1] (mg) [Entry date 11/05/01]
11/14/01	265	STATUS REPORT by petitioner dated November 14, 2001: Petition for Rehearing has been filed with the U.S. Supreme Court (copy of petition attached) (mg)
11/26/01	266	RESPONSE by respondent Ricky Bell to motion for relief [254-1] (w/att'd exhibits 1-2) (vm)

DATE	NO	PROCEEDINGS
11/27/01	267	ORDER by Judge Todd J. Campbell re [254-1] Because this motion is a second or a successive petition subject to 28 USC Section 2244, this case is transferred to the 6CCA pursuant to 28 USC Section 1631 (cc: all counsel, 6C) EOD 11/27/01 (mg)
11/29/01	--	REMARK: Record transferred to the 6CCA; copies of pertinent documents forwarded to 6CCA. (mg) [Edit date 11/30/01]
11/30/01	268	NOTICE OF APPEAL by petitioner Abu-Ali Abdur'Rahman from Dist. Court decision [267-1] (mg) [Entry date 12/03/01]
11/30/01	269	APPLICATION by petitioner for a certificate of appealability (with attachment 1) (mg) [Entry date 12/03/01]
12/3/01	--	REMARK: Copy of NOA and docket sheet sent to the parties. (mg)
12/3/01	270	ORDER by Judge Todd J. Campbell re [269-1] The Court finds that it does not have jurisdiction to rule on petitioner's appl for a certificate of appealability (cc: all counsel, 6C) EOD 12/4/01 (mg) [Entry date 12/04/01]
12/4/01	--	SR Record on Appeal sent to 6th CCA re [268-1] (mg)
12/10/01	272	NOTIFICATION by 6th CCA of Appellate Docket Number 01-6504 (mg) [Entry date 12/11/01] [Edit date 12/12/01]

DATE	NO	PROCEEDINGS
12/10/01	273	ORDER by the Supreme Court of the U.S. denying petition for rehearing (mg) [Entry date 12/12/01]
1/20/02	274	ORDER from 6th CCA: The appl for a certificate of appealability is denied. The motions or requests that Rule 60(b) appeal be heard initially en banc and to consolidate the Rule 60(b) appeal with pending motions in Numbers 98-6568/6569 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied. (mg) [Entry date 01/22/02]
2/13/02	275	ORDER from 6th CCA: Petitioner's motion for rehearing of Nos 98-6568/6569 is DENIED; Petitioner's motion to consolidate No. 01-6504 with Nos 98-6568/6569 is DENIED; the Mandate of the court in Nos 98-6568/6569 shall issue forthwith; The order construing an ostensible Rule 60(b) motion as an appl for leave to file a second habeas corpus petition and transfering it to the court of appeals is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction; The motion for initial hrg en banc of No. 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter is DENIED; The appl for leave to file a second habeas corpus petition, as transfered to the court of the district court in No. 01-6487, is DENIED.

DATE	NO	PROCEEDINGS
		Review of the above cases concluded. (mg) [Entry date 02/14/02] [Edit date 02/14/02]
2/13/02	276	MANDATE issued 2/11/02, from 6th CCA reversing decision of the District Court [Appeal [225-1] finding prejudice at the sentencing stage, VACATING the judgment of the district court granting petition for a writ of habeas corpus as to petitione's death sentence (6C Nos 98-6568/ 98-6569) (mg) [Entry date 02/14/02]
2/28/02	277	MANDATE issued 2/26/02 from 6th CCA dismissing the appeal [268-1] for lack of jurisdiction pursuant to the courts disposition filed 2/11/02 (re 6C #6504) (mg)
4/8/02	278	ORDER from the US Supreme Court (01-9094): The application for stay of execution presented to Justice Stevens & by him referred to the Court is granted pending the disposition of the for a writ of certiorari. Should the petition for a writ of cert. be denied, this stay shall terminate automatically. the event the petition for a writ of cert. is granted, the stay shall terminate upon the sending down of the judgment of this Court. EOD 4/8/02 (cc: all counsel) (db) [Edit date 04/09/02]
4/8/02	279	ORDER from the US Supreme Court (01-9095) denying the petition for writ of habeas corpus. EOD 4/8/02 (cc: all counsel) (db) [Edit date 04/09/02]

DATE	NO	PROCEEDINGS
4/22/02	280	NOTICE from US Supreme Court that a writ of certiorari was filed on 3/19/02 and placed on the 4/19/02 docket as No. 01-9094 (af)
5/14/02	281	NOTICE from US Supreme Court that lv to proceed IFP granted and petition for writ of certiorari granted (mk)

U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

CIVIL DOCKET FOR CASE #: 98-6568/-6569

ABU-ALI ABDUR'RAHMAN,

Petitioner – Appellee – Cross-Appellant,

v.

RICKY BELL,

Respondent – Appellant – Cross-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
11/20/98	Death Penalty Case Docketed, with CPC unnecessary. Notice filed by Appellant Ricky Bell. Transcript needed: y (jmb) [98-6568]
2/24/99	FIRST PROOF BRIEF filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of Service date 2/22/99. Number of Pages: 43. [98-6568, 98-6569] (teb) [98-6568 98-6569]
2/24/99	Request to require oral argument filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. [98-6568, 98-6569] (teb) [98-6568 98-6569]
4/26/99	PROOF BRIEF filed by Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Copies: 1. Certificate of Service date 4/23/99. Number of Pages: 134. [98-6568, 98-6569] (ds) [98-6568 98-6569]

DATE	PROCEEDINGS
8/30/99	PROOF BRIEF filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 8/27/99. Number of Pages: 50. [98-6568, 98-6569] (ds) [98-6568 98-6569]
9/27/99	FINAL BRIEF filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Copies: 7. Certificate of Service date 9/24/99. Number of Pages: 44. [98-6568, 98-6569] (ds) [98-6568 98-6569]
9/27/99	FINAL BRIEF filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Copies: 7. Certificate of service date 9/24/99. Number of Pages: 44. [98-6568, 98-6569] (ds) [98-6568 98-6569]
9/28/99	FINAL BRIEF filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Copies: 7 Certificate of service date 9/27/99. Number of Pages: 115. [98-6568, 98-6569] (ds) [98-6568 98-6569]
9/28/99	FINAL BRIEF filed by Bradley A. MacLean and William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Copies: 7. Certificate of service date 9/27/99. Number of Pages: 75. [98-6568, 98-6569] (ds) [98-6568 98-6569]
10/6/99	APPENDIX filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Copies: 5 (11 Volumes/VOL IV SEALED). Certificate of service date 9/14/99. [98-6568, 98-6569] (ds) [98-6568 98-6569]
10/13/99	Corrected fourth final brief filed by Bradley A. MacLean and William P. Redick. Copies:

DATE	PROCEEDINGS
	7. Certificate of Service date 10/12/99. [98-6568, 98-6569] (ds) [98-6568 98-6569]
10/13/99	Appellee MOTION filed to file supplemental appendix. Motion filed by William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569. Certificate of service date 10/12/99. [98-6568, 98-6569] (jmb) [98-6568 98-6569]
10/13/99	SUPPLEMENTAL APPENDIX TENDERED. Received from William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569. [98-6568, 98-6569] Copies: 7. Certificate of service date 10/12/99. Corrections to be made: motion pending (jmb) [98-6568 98-6569]
11/16/99	ORDER filed granting motion to file supplemental appendix [2030493-1] filed by William P. Redick Jr., Bradley A. MacLean, William P. Redick Jr., Bradley A. MacLean [98-6568, 98-6569] in 98-6568, 98-6569. Entered by order of the court. (jmb) [98-6568 98-6569]
11/16/99	SUPPLEMENTAL APPENDIX filed by Brian K. Frazier for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Copies: 7. Certificate of service date 10/12/99. [98-6568, 98-6569] (ds) [98-6568 98-6569]
1/6/00	CERTIFIED RECORD filed. Volumes include 1 Pl. [98-6568, 98-6569] (mrs) [98-6568 98-6569]

DATE	PROCEEDINGS
1/25/00	ADDITIONAL CITATION filed by William P. Redick and Bradley MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568, 98-6569. Certificate of service date 1/25/00. [98-6568, 98-6569] (cb) [98-6568 98-6569]
1/27/00	ORDER filed denying motion to enlarge the time for oral argument [2088556-1] filed by William P. Redick Jr., Bradley A. MacLean [98-6568, 98-6569] in 98-6568, 98-6569. Entered by order of the court. (jmb) [98-6568 98-6569]
1/28/00	ADDITIONAL CITATION filed by Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 1/25/00. [98-6568, 98-6569] (yh) [98-6568 98-6569]
1/31/00	CAUSE ARGUED on 1/31/00 by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell in 98-6568/6569, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569, William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568/6569, before Judges Siler, Batchelder, Cole. [98-6568, 98-6569](me) [98-6568 98-6569]
4/27/00	ADDITIONAL CITATION filed by William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6568, William P. Redick for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6569, Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman in 98-6569. Certificate of

DATE	PROCEEDINGS
	service date 4/25/00. [98-6568, 98-6569] (cb) [98-6568 98-6569]
7/17/00	ADDITIONAL CITATION filed by William P. Redick & Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman Certificate of service date 7/14/00. [98-6568, 98-6569] (cb) [98-6568 98-6569]
9/13/00	OPINION filed: the dist. ct's. finding of prejudice at the sentencing stage is REVERSED; the dist. ct's. judgment granting the petition for writ of habeas corpus as to petitioner Abu-Ali Abdur'Rahman's death sentence is VACATED; the dist. ct's. judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED. Decision for publication pursuant to local rule 206 [98-6568, 98-6569]. Eugene E. Siler, Authoring Circuit Judge; Alice M. Batchelder, Circuit Judge, concurring; R.G. Cole, Circuit Judge, dissenting. (jmb) [98-6568 98-6569]
9/13/00	JUDGMENT: the district court's finding of prejudice at the sentencing stage is REVERSED; the district court's judgment granting the petition for a writ of habeas corpus as to petitioner Abu-Ali Abdur'Rahman's death sentence is VACATED; the district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED. (jmb) [98-6568 98-6569]
9/20/00	FILED: Copy of Motion filed at Supreme Court of Tennessee to re-set the execution date, from Glenn R. Pruden for Appellant

DATE	PROCEEDINGS
	Cross-Appellee Ricky Bell in 98-6568, 98-6569 [98-6568, 98-6569] (cb) [98-6568 98-6569]
10/11/00	PETITION for en banc rehearing filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/10/00. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/23/00	LETTER SENT by blh to Gordon W. Smith for Appellant Cross-Appellee Ricky Bell notifying that party is directed to respond to a petition for en banc rehearing [2235975-1] filed by William P. Redick Jr. and Bradley A. MacLean. Response due by 11/6/00. Gordon W. Smith was also notified by telephone today. [98-6568, 98-6569]. (blh) [98-6568 98-6569]
11/6/00	RESPONSE to a petition for en banc rehearing [2235975-1] previously filed by William P. Redick Jr. and Bradley A. MacLean. Response filed by Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of service date 11/3/00. [98-6568, 98-6569] (blh) [98-6568 98-6569]
12/11/00	CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [98-6568, 98-6569]. Volumes included:1 Pl;. (mrs) [98-6568 98-6569]
12/22/00	ORDER filed denying petition for en banc rehearing [2235975-1] filed by William P. Redick Jr. and Bradley A. MacLean. [98-6568, 98-6569]. Eugene E. Siler, Alice M. Batchelder, R. G. Cole, Circuit Judges. (blh) [98-6568 98-6569]

DATE	PROCEEDINGS
12/28/00	Appellee MOTION filed for stay of mandate pending petition for writ of certiorari. Motion filed by William P. Redick & Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 12/28/00. [98-6568, 98-6569] (mcp) [98-6568 98-6569]
1/9/01	Appellant RESPONSE in opposition filed regarding a motion to stay mandate [2279628-1] ; previously filed by William P. Redick Jr., Bradley A. MacLean . Response from Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of service date 1/8/01. [98-6568, 98-6569] (jmb) [98-6568 98-6569]
1/9/01	ORDER filed granting motion to stay mandate pending petition for writ of certiorari [2279628-1] filed by William P. Redick Jr., Bradley A. MacLean [98-6568, 98-6569] in 98-6568, 98-6569. Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit Judge, R. G. Cole, Circuit Judge. (jmb) [98-6568 98-6569]
1/11/01	ORDER filed granting motion to stay mandate for 90 days pending application for cert [2279628-1] filed by William P. Redick Jr., Bradley A. MacLean, William P. Redick Jr., Bradley A. MacLean [98-6568, 98-6569] in 98-6568, 98-6569. Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit Judge, R. G. Cole, Circuit Judge. (cb) [98-6568 98-6569]
3/12/01	U.S. Supreme Court letter filed: Extension of time within which to file a petition for a writ of certiorari granted to and including 04-21-01. [2320171-1]. [98-6568, 98-6569] (swh)

DATE	PROCEEDINGS
	[98-6568 98-6569]
4/19/01	U.S. Supreme Court letter filed: Extension of time within which to file a petition for a writ of certiorari granted to and including 05-11-01. [2341826-1]. [98-6568, 98-6569] (swh) [98-6568 98-6569]
5/3/01	U.S. Supreme Court letter filed: Extension of time in which to file a petition for a writ of certiorari granted to and including 05-21-01. [2349328-1]. [98-6568, 98-6569] (swh) [98-6568 98-6569]
5/31/01	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Filed in the Supreme Court on 05-21-01, Supreme Ct. case number: 00-1742. [98-6568, 98-6569] (swh) [98-6568 98-6569]
10/10/01	Appellee MOTION filed to stay the mandate and grant rehearing en banc or remand for further proceedings. Motion filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/9/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/12/01	ADDITIONAL CITATION in support of the motion to withhold the mandate and grant rehearing en banc or remand for further proceedings filed by Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/11/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/16/01	U.S. Supreme Court letter filed denying petition for writ of certiorari [2365390-1]

DATE	PROCEEDINGS
	filed by Abu-Ali Abdur'Rahman [98-6568, 98-6569] in 98-6568, 98-6569. Filed in the Supreme Court on 10-09-01. (swh) [98-6568 98-6569]
10/17/01	LETTER SENT by blh to Gordon W. Smith for Appellant Cross-Appellee Ricky Bell notifying that party is directed to respond to a motion to stay mandate and grant rehearing en banc or remand for further proceedings [2437729-1] filed by William P. Redick Jr. and Bradley A. MacLean. Response due by 10/31/01. [98-6568, 98-6569]. (blh) [98-6568 98-6569]
10/18/01	Appellant Cross-Appellee RESPONSE filed in opposition to motion to stay the mandate and grant rehearing en banc or remand for further proceedings [2437729-1] filed by William P. Redick Jr. and Bradley A. MacLean. Response from Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of service date 10/17/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/29/01	Appellee Cross-Appellant MOTION filed for leave to file a reply in support of his petition for rehearing en banc. [2448170-1] Motion filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/26/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
10/29/01	TENDERED: reply in support of his petition for rehearing en banc from William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman [98-6568, 98-6569] (blh) [98-6568 98-6569]

DATE	PROCEEDINGS
10/29/01	TENDERED: reply in support of his motion to stay the mandate and grant rehearing en banc or remand for further proceedings from William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman [98-6568, 98-6569] (blh) [98-6568 98-6569]
11/30/01	LETTER SENT by blh granting motion for leave to file a reply in support of the petition for rehearing en banc [2448170-1] filed by William P. Redick Jr. and Bradley A. MacLean. Appellee/Cross-Appellant's reply in support of the motion to withhold the mandate or remand for further proceedings is also accepted for filing. [98-6568, 98-6569] (blh) [98-6568 98-6569]
11/30/01	REPLY IN SUPPORT of the petition for rehearing en banc filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/26/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
11/30/01	REPLY IN SUPPORT of the motion to withhold the mandate or remand for further proceedings [2437729-1]; filed by William P. Redick Jr. and Bradley A. MacLean for Appe'lee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 10/26/01. [98-6568, 98-6569] (blh) [98-6568 98-6569]
12/6/01	U.S. Supreme Court letter filed: petition for rehearing denied [2467605-1]. Filed in the Supreme Court on 12-03-01. (swh) [98-6568 98-6569]
12/17/01	Order of the Supreme court of Tennessee

DATE	PROCEEDINGS
	FILED: Denying the motion of the Abu-Ali Abdur'Rahman to strike the State's motion to set an execution date. [98-6568, 98-6569] (cb) [98-6568 98-6569]
1/7/02	Appellee MOTION filed to consolidate case 01-6504 with 98-6568/6569. Motion filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 1/4/02. [98-6568, 98-6569] (blh) [98-6568 98-6569]
1/9/02	Appellant RESPONSE in opposition to Appellee's motion to consolidate case 01-6504 with 98-6568/6569 [2482480-1] filed by William P. Redick Jr., and Bradley A. MacLean. Response from Gordon W. Smith for Appellant Cross-Appellee Ricky Bell. Certificate of service date 1/8/02. [98-6568, 98-6569] (blh) [98-6568 98-6569]
1/18/02	OPINION filed denying the motion to grant a certificate of appealability. The motions that the Rule 60(b) appeal be heard initially en banc and to consolidate that appeal with pending motions in nos. 98-6568/69 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied. Decision not for publication pursuant to local rule 28(g) [98-6568, 98-6569, 01-6504]. Eugene E. Siler, Authoring Judge, Alice M. Batchelder, R. G. Cole, Circuit Judges. (yh) [98-6568 98-6569]
2/8/02	SUPPLEMENTAL MOTION of Appellee filed to consolidate for submission the following cases: 98-6568/6569 with 01-6504.

DATE	PROCEEDINGS
	Motion filed by William P. Redick and Bradley A. MacLean for Appellee Cross-Appellant Abu-Ali Abdur'Rahman. Certificate of service date 2/7/02. [98-6568, 98-6569] (blh) [98-6568 98-6569]
2/11/02	ORDER filed: Petitioner's motion for rehearing of nos. 98-6568/6569 is DENIED. Petitioner's motion to consolidate no. 01-6504 with nos. 98-6568/6569 is DENIED. The mandate of the court in nos. 98-6568/6569 shall issue forthwith. The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in no. 01-6504, which is therefore DISMISSED for lack of jurisdiction. The motions for initial hearing en banc of no. 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter are hereby DENIED. The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in no. 01-6487 is DENIED. As we stated in an opinion filed in nos. 98-6568/6569; 01-6504 on 1/18/02, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." With this order the court's review of nos. 98-6568/6569, 01-6487, and 01-6504 is hereby concluded. [98-6568 98-6569] also applied to 01-6487 01-6504. Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit Judge, R. G. Cole, Circuit Judge. (pje) [98-6568 98-6569]

DATE	PROCEEDINGS
2/11/02	MANDATE ISSUED with no cost taxed [98-6568, 98-6569] (pje) [98-6568 98-6569]

CIVIL DOCKET FOR CASE #: 01-6504

IN RE ABU-ALI ABDUR'RAHMAN,

Petitioner – Appellant,

v.

RICKY BELL,

Respondent – Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
12/6/01	Death Penalty Case Docketed, with certificate of appealability pending. Notice filed by Appellant Abu-Ali Abdur'Rahman. Transcript needed: y (yh)
12/6/01	Appellant MOTION filed to grant a certificate of appealability and to consolidate current appeal with case numbers 98-6568/69. Motion filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 12/5/01. [01-6504] (yh)
12/6/01	PETITION for en banc hearing filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 12/5/01. [01-6504] (blh)
12/7/01	Copy of District Court Order filed - Court does not have jurisdiction to rule on petitioner's motion for a certificate of appealability [01-6504] (yh)
12/18/01	Supreme Court of the State of Tennessee order filed 12/11/01 denying petitioner's motion to strike the State's motion to set an execution date. A response to the motion shall be filed on or

DATE	PROCEEDINGS
	before 12/21/01. (yh)
12/19/01	Appellee RESPONSE in opposition to the motion to grant certificate of appealability, request that appeal be heard initially en banc and motion to consolidate current appeal with 98-6568/69 previously filed by William P. Redick Jr., Bradley A. MacLean . Response from Gordon W. Smith for Appellee Ricky Bell. Certificate of service date 12/19/01 [01-6504] (yh)
12/20/01	TENDERED: reply to response to the application for certificate of appealability, etc. from William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman [01-6504] (yh)
1/7/02	Appellant MOTION filed to consolidate for submission the following cases: 01-6504/98-6568/69 . Motion filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 1/4/02 [01-6504] (yh)
1/9/02	Appellee RESPONSE opposition filed regarding a motion to consolidate for submission previously filed by William P. Redick Jr. and Bradley A. MacLean . Response from Michael Moore and Gordon W. Smith for Appellee Ricky Bell. Certificate of service date 1/8/02 [01-6504] (yh)
1/18/02	OPINION filed denying motion to grant certificate of appealability [2468590-1]. The motions that the Rule 60(b) appeal be heard initially en banc and to consolidate that appeal with pending motions in no. 98-6568/69 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied. Decision not for publication pursuant to local rule 28(g) [01-6504]. Eugene E. Siler, Authoring Judge,

DATE	PROCEEDINGS
	Alice M. Batchelder, R. G. Cole, Circuit Judges. (yh)
2/1/02	PETITION for en banc rehearing filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 1/31/02. [01-6504] (blh)
2/7/02	ADDITIONAL CITATION filed by William P. Redick and Bradley A. MacLean for Appellant Abu-Ali Abdur'Rahman. Certificate of service date 2/6/02. [01-6504] (blh)
2/11/02	ORDER filed: Petitioner's motion for rehearing of 98-6568, 98-6569 is hereby DENIED. Petitioner's motion to consolidate 01-6504 with 98-6568/6569 is hereby DENIED. The mandate of the court in 98-6568/6569 shall issue forthwith. The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in 01-6504, which is therefore, DISMISSED for lack of jurisdiction. The motion for initial hearing en banc of 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter are hereby DENIED. The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in 01-6487 is DENIED. As we stated in an opinion filed in 98-6568 98-6569; 01-6504 on 1/18/02, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." With this order the court's review of 98-6568 98-6569, 01-6487, and 01-6504 is hereby concluded. [01-6504] also applied to cases 98-6568 98-6569 and 01-6487 Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit

DATE	PROCEEDINGS
	Judge, R. G. Cole, Circuit Judge. (pje)
2/26/02	MANDATE ISSUED with no cost taxed [01-6504] (pje)
4/12/02	U.S. Supreme Court notice filed regarding petition for writ of certiorari, filed by Appellant Abu-Ali Abdur'Rahman. Filed in the Supreme Court on 03-19-02 , Supreme Ct. case number: 01-9094 . [01-6504] (swh)
4/25/02	U.S. Supreme Court opinion filed granting petition for writ of certiorari and leave to proceed in forma pauperis [2535142-1] filed by Abu-Ali Abdur'Rahman [01-6504] .Filed in the Supreme Court on 04-22-02 . Copies sent to:Judges Siler, Batchelder, and Cole. (swh)

CIVIL DOCKET FOR CASE #: 01-6487

In Re ABU-ALI ABDUR'RAHMAN,

Petitioner,

DOCKET ENTRIES

DATE	PROCEEDINGS
12/3/01	Application for permission to file a second or successive petition for habeas corpus Docketed. Notice filed by Petitioner Abu-Ali Abdur'Rahman. This case is a transfer from the district court. (yh)
12/5/01	Petitioner MOTION filed to hold case in abeyance pending final determination of two pending appeals: en banc pending in 98-6568/69 and appeal from denial of 60(b)motion. Motion filed by William P. Redick and Bradley A. MacLean for Petitioner Abu-Ali Abdur'Rahman. Certificate of service date 11/4/01. [01-6487] (yh)
12/20/01	Respondent RESPONSE opposition filed regarding a motion to hold case in abeyance pending final determination of two pending appeals, (1) en banc proceedings in 98-6568/69 and (2) appeal from denial of motion for relief under 60(b) previously filed by William

DATE	PROCEEDINGS
	P. Redick Jr., Bradley A. MacLean. Response from Gordon W. Smith for Appellee Ricky Bell. Certificate of service date 12/19/01 [01-6487] (yh)
12/20/01	MOTION CAUSE SUBMITTED on briefs to panel consisting of Judges Siler, Batchelder, Cole [01-6487] (max)
2/11/02	ORDER filed: Petitioner's motion for rehearing of nos .98-6568/6569 is DENIED. Petitioner's motion to consolidate no. 01-6504 with nos. 98-6568/6569 is DENIED. The mandate of the court in nos. 98-6568/6569 shall issue forthwith. The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in no. 01-6504, which is therefore DISMISSED for lack of jurisdiction. The motions for initial hearing en banc of no. 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter are hereby DENIED. The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in no. 01-6487 is DENIED. As we stated in an opinion filed in nos. 98-6568/6569; 01-6504 on 1/18/02, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default". With this order the court's review of nos. 98-6568/6569, 01-6487,

DATE	PROCEEDINGS
	and 01-6504 is hereby concluded. [01-6487] also applied to cases 98-6568/6569 and 01-6504. Eugene E. Siler, Circuit Judge, Alice M. Batchelder, Circuit Judge, R. G. Cole, Circuit Judge. (pje)
4/12/02	U.S. Supreme Court notice filed regarding petition for writ of certioriari filed by the Petitioner Abu-Ali Abdur'Rahman. Filed in the Supreme Court on 03-19-02, Suprem court case number:wh)
4/16/02	U.S. Supreme Court order filed: application for stay of execution of sentence of death presented to Justice Stevens and referred to the Court is GRANTED pending the disposition of the petition for a writ of certiorari. Should the petition be denied, this stay shall terminate automatically. If petition is granted, the stay shall terminate upon the sending down of the judgment of this Court. [2536450-1]. Filed in the Supreme Court on 04-08-02. (swh)
4/25/02	U.S. Supreme Court opinion filed granting petition for writ of certiorari and granting leave to proceed in forma pauperis [2535141-1] filed by Abu-Ali Abdur'Rahman [01-6487]. Filed in the Supreme Court on 04-22-02. (swh)

Nos. 98-6568/6569, 01-6504

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR'RAHMAN,
Petitioner – Appellant,
v.
RICKY BELL,
Respondent – Appellee.

Before: SILER, BATCHELDER and COLE, Circuit Judges.

SILER, Circuit Judge. This matter comes before the court on the application by Abdur'Rahman for a certificate of appealability, a request that his Fed.R.Civ.P. 60(b) appeal be heard initially en banc and a motion to consolidate his Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 to withhold mandate, grant a rehearing en banc, and remand. For the reasons stated hereafter, insofar as we have the authority, the motions are denied.

His application for a certificate of appealability arises from the transfer by the district court of this matter after he had applied for relief from judgment under Fed.R.Civ.P. 60(b). Petitioner moved the district court for relief from judgment under Rule 60(b) based upon the fact that Tennessee Supreme Court Rule 39 was just adopted on June 28, 2001, in which it stated:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies

> respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tenn. Code. Ann. § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

The petitioner raised it in a Rule 60(b) motion because this case was appealed to the Tennessee Supreme Court after 1967 and the district court in this case found that certain claims were barred by the failure of the petitioner to seek discretionary review from the Tennessee Supreme Court. *See Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1080-82 (M.D. Tenn. 1988). The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas corpus petition, *see McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gateway criteria of 28 U.S.C. § 2244(b).

We consider that this is the equivalent of a successive habeas corpus petition, so it is necessary to determine whether the petition meets the criteria of 28 U.S.C. § 2244(b)(2). Abdur'Rahman has not been able to meet these criteria. First, he does not rely upon a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. Second, there is no factual predicate for the claim which could not have been discovered previously through the exercise of due diligence. Finally, he does not show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense charged. Instead, his argument rests upon a state procedural rule, adopted three years after the district

court's judgment. The district court properly found that the claims were then unexhausted for failure to present them before the Tennessee Supreme Court under the authority of *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). In addition, the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default. *See Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000).

Therefore, the application for a certificate of appealability is denied. The motions or requests that the Rule 60(b) appeal be heard initially en banc and to consolidate the Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-6568/6569,01-6504

ABU-ALI ABDUR RAHMAN,
Petitioner – Appellant.
v.
RICKY BELL, Warden,
Respondent – Appellee.

ORDER

Before: SILER, BATCHELDER, and COLE, Circuit Judges

These cases are before the court upon the motions of the petitioner to withhold issuance of the mandate in Nos. 98-6558/6569, the appeal and cross-appeal from the decision of the district court on the application for a writ of habeas corpus, and to rehear the cases en banc or remand to the district court for further proceedings. Petitioner has also moved that the court hear en banc No. 01-6504, his appeal from the judgment of the district court finding his Rule 60(b) motion to be a second or successive habeas corpus petition subject to 28 U.S.C.§2244 and transferring it as such to this court, and to consolidate it with the pending motions in Nos. 98-6568/6569, the latter request having been the subject of a supplemental motion filed February 8, 2002. Additionally, petitioner has asked for rehearing en banc of the panel's January 18, 2002 order denying, inter alia, his request for a certificate of appealability in No. 01-6504; petitioner has supplemented that request for en banc review with a statement of additional authority. Finally, petitioner has applied for leave to file a new habeas corpus petition in No. 01-6487.

The requests for en banc consideration have not been favored by a majority of the active judges of the court, and

the matter is referred to the original panel. Upon consideration of the pleadings noted above, it is the decision of the court that:

Petitioner's motion for rehearing of Nos. 98-6568/6569 is hereby DENIED

Petitioner's motion to consolidate No. 01-6504 with Nos. 98-6568/6569 is hereby DENIED

The mandate of the court in Nos. 98-6568/656 shall issue forthwith

The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction

The motions for initial hearing en banc of No. 01-6504 and for rehearing of the court' denial of a certificate of appealability in the matter are hereby DENIED

The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in No. 01-6487, is DENIED. As we stated in an opinion filed in Nos. 98-6568/6569; 01-6504 on January 18, 2002, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default."

With this order the court's review of Nos. 98-6568/6569, 01-6487, and 01-6504 is hereby concluded.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
V.
RICKY BELL, Warden

ORDER

Pending before the Court is Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 254). Because the Motion is a second or successive petition subject to 28 U.S.C. § 2244, this case is transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).

Petitioner, in this capital habeas corpus case, has moved pursuant to Fed. R. Civ. P. 60(b) for relief from this Court's Judgment of April 8, 1998 (Docket Nos. 205 and 206). *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998), *aff'd. in part and rev'd. inpart*, 226 F.3d 696 (6th Cir. 2000), *cert. denied*, 122 S.Ct. 386 (2001), *pet. for reh'g pending*. The Rule 60(b) Motion is predicated upon a new Tennessee Supreme Court Rule, Rule 39 ("Rule 39"), adopted on June 28, 2001.[1]

[1] Tennessee Supreme Court Rule 39 reads as follows:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

In the 1998 Judgment, this Court ruled that certain of Petitioner's claims had not been exhausted in state court and, therefore, were defaulted. Based on new Rule 39, Petitioner asserts that a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes and, therefore, the claims in question were exhausted and the Court must now rule on the merits of those claims.

Respondent asserts that this Rule 60(b) Motion is actually a second or successive petition subject to 28 U.S.C. § 2244. The proper procedure, according to Respondent, is for this Court to transfer the matter to the Sixth Circuit for its determination of whether the Rule 60(b) Motion satisfies the gateway criteria of 28 U.S.C. § 2244(b). Respondent relies primarily on *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996). In *McQueen*, the Sixth Circuit held "[w]e agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition...." *Id. See, also, United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc); *Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996); and *United States v. Hernandez*, 158 F.Supp.2d 388, 391 (D. Del. 2001).

Petitioner argues that this Rule 60(b) Motion is not a second or successive petition because it raises no new claims, no new facts, and does not rely on new law. Petitioner relies primarily on *Rodriguez v. Mitchell*, 252 F.3d 191, 198-200 (2nd Cir. 2001). In *Rodriguez*, the Second Circuit held "a Motion under Rule 60(b) to vacate a judgment denying

habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)." *Id.* at 198.

In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition. *McQueen v. Scroggy*, 99 F.3d at 1334-35. 28 U.S.C. § 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

Because this Rule 60(b) Motion presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court's Judgment, the Court finds that the Motion is a second or successive habeas petition subject to 28 U.S.C. § 2244. Accordingly, this Court is without jurisdiction to decide the Rule 60(b) Motion. The case is hereby transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
V.
RICKY BELL, Warden

ORDER

Pending before the Court is Petitioner's Application for Certificate of Appealability (Docket No. 269). For the reasons described herein, the Court is without jurisdiction to rule on the Application.

By Order (Docket No. 267) entered on November 27, 2001, the Court ruled that it was without jurisdiction to decide Petitioner's Rule 60(b) Motion because the Motion was a second or successive petition subject to 28 U.S.C. § 2244. The Court, accordingly, ordered the case transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and *In re Sims*, 111 F.3d 45 (6th Cir. 1997).[1]

Petitioner's Application for Certificate of Appealability asks the Court to grant a certificate of appealability. See 28 U.S.C. §§ 2253(c); Fed. R. App. P. 22(b); *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). According to Petitioner:

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[1] The Court also notes that this case was on appeal at the time the Rule 60(b) Motion was filed in this Court and that it remains on appeal at this time. Therefore, the Court generally lacks jurisdiction over the case due to the appeal. See *First Nat'l Bank of Salem Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976) regarding the procedure for a District Court to act on a Rule 60(b) motion to vacate a judgment that is on appeal.

> Specifically, a COA should issue because reasonable jurists could disagree (and have disagreed) with this Court's conclusions that: (1) Every 60(b) motion in a habeas case is a second or successive petition; (2) Tennessee Supreme Court Rule 39 is a "new" rule of law; and (3) Abu-Ali Abdur'Rahman is not entitled to relief, despite egregious prosecutorial misconduct, including deliberate falsification of evidence pivotal to the death sentence.

Application, Docket No. 269, p. 1.

For the reasons stated in the prior Order (Docket No. 267), the Court finds that it does not have jurisdiction to rule on Petitioner's Application for Certificate of Appealability.

The Clerk shall send a copy of this Order to the Clerk of the Sixth Circuit Court of Appeals.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
v.
RICKY BELL

ORDER

Petitioner, Abu-Ali Abdur' Rahman, has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth in the accompanying Memorandum, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. Petitioner shall remain incarcerated as described in the Memorandum.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
v.
RICKY BELL

MEMORANDUM

I. Introduction

Petitioner, Abu-Ali Abdur' Rahman[1], has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth below, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

The basis of the Court's opinion, as is described in detail herein, is that Petitioner was unconstitutionally sentenced to death because he did not receive the effective assistance of counsel guaranteed by the Sixth Amendment. This Court, along with the state post-conviction trial and appellate courts, finds that trial counsel for Petitioner failed to adequately represent their client. This Court further finds that Petitioner was seriously prejudiced by utterly ineffective assistance of counsel at his sentencing hearing. Trial counsel, for instance, failed to investigate and inform the jury about Petitioner's unstable mental history and bizarre family background. The

[1] Petitioner has changed his name from James Lee Jones to Abu-Ali Abdur'Rahman.

jury, as a result, did not hear significant mitigating evidence before deciding whether to sentence Petitioner to death. This is not to suggest that Petitioner, or anyone with an unstable mental history or bad childhood, cannot be sentenced to death. However, a sentence of death must be imposed in accordance with the Constitution and in this case was not. This is not a case where counsel presented the jury with most of the available mitigation evidence and merely missed some evidence. This is not an instance of harmless error. Despite an abundance of mitigating evidence, there was virtually a complete failure by counsel to present a defense to the jury at Petitioner's sentencing. Accordingly, as is more fully discussed in Section VIII, Ineffective Assistance of Counsel, the Constitution has been violated and the writ of habeas corpus must issue as to Petitioner's death sentence.

II. Proceedings in the State Courts

Petitioner was tried and convicted of first degree murder, assault with intent to commit murder, and armed robbery. (Addendum 1, at 2000). After a subsequent sentencing hearing, Petitioner received the death penalty for the first degree murder conviction. The jury found the existence of three aggravating circumstances: (1) Petitioner had been convicted of prior violent felonies (assault with a deadly weapon and second degree murder); (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the Petitioner was engaged in committing or attempting to commit a first degree murder or robbery. (Addendum 1, 1986-2001). The court sentenced the Petitioner to life on each of the other offenses, to be served consecutively to each other. (Addendum 1, at 13-14)[2].

[2] The court also determined that, if the death sentence were to later be reduced to a life sentence, that sentence would be served consecutively to the other life sentences. (Addendum 1, at 14). In addition, the state sentences would be served consecutively to the federal sentence for which

Petitioner was represented at trial by Lionel Barrett and Sumter Camp. After trial, Mr. Barrett and Mr. Camp withdrew, and the state court appointed Richard Dinkins to represent Petitioner on direct appeal to the Tennessee Supreme Court. (Addendum 1, Technical Record, at 87). The Tennessee Supreme Court affirmed Petitioner's conviction and sentence. *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

The state court appointed another attorney to assist Mr. Dinkins in the post-conviction proceedings, who was joined by a volunteer lawyer from the Capital Case Resource Center. (Addendum 11, Technical Record, at 23, 50, 82). The post-conviction trial court found trial counsel had been ineffective in their representation of Petitioner at sentencing. (Addendum 11, at 81-109). The court, however, went on to find that trial counsel's deficiencies did not result in prejudice to the Petitioner and rejected all other claims. *Id.* The Tennessee Court of Criminal Appeals[2] affirmed that judgment, and the Tennessee Supreme Court denied Petitioner's application for permission to appeal. *Jones v. State*, 1995 WL 75427, at *2 (Tenn. Crim. App. Feb. 23, 1995).

The post-conviction trial court gave the following summary of facts in its opinion:

> The facts are that petitioner and his codefendant, Harold Deval Miller, went to the victims home. Petitioner wants to describe the events that took place after that as a misguided attempt to rid the community of drug dealers, as it appears that the victim, Patrick Daniels, was a small time marijuana dealer. Codefendant, Mr. Miller, testified for the State, however, and he described the motive for the visit as

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Petitioner was on parole when he was convicted of the state offenses. (*Id.*)

[2]The panel consisted of only two judges, rather than the usual three judges.

robbery. The victim, Patrick Daniels, lived with Norma Norman. Petitioner and Miller entered the home and bound Daniels and Norman. What happened next is described in the appellate decision.

> The victim in this case was bound, gagged, and blind folded with duct tape. He was distressed, crying, and begging not to be hurt. Defendants stood over him and stabbed him six (6) times, four (4) times penetrating the heart. He then watched as the victim went into convulsions, blood spewing from his nose and mouth. His accomplice testified, "he was working himself up on a rhythm," he was "cool" and "under control." The victim continued to plead with the defendant as he was being stabbed.
>
> *State v. Jones*, *supra*, at 550. The defendant also stabbed Norma Norman numerous times, but she miraculously survived the attack.

(Addendum 11, 83-84).

III. Proceedings in this Court

Prior to the evidentiary hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(l), (4), (C8)) were unconstitutional. (Docket Nos. 123, 124). The Court granted summary judgment to the Respondent on the following claims: the *Batson* challenge (Amended Petition, at ¶ C2(2)); exclusion of jurors based on religious beliefs (¶¶ C2(3),(4)); failure to exclude certain jurors for cause (¶ C2(5)); sufficiency of evidence of robbery and first degree murder (¶ C3); inadequate proportionality review (¶ C9); prosecutor's questions during guilt phase (¶ D4); prosecutorial misconduct

involving publication of indictments to jury (¶ D6); cross examination of Petitioner at sentencing (¶ D7); and State's argument at sentencing regarding the Southeastern Gospel Ministry (¶ D8(4)). (Docket Nos. 156, 157). The Court denied summary judgment on Petitioner's conflict of interest and ineffective assistance of counsel claims, having found the existence of a factual dispute. (*Id.*) The Court denied Respondent's motion for summary judgment on procedural default issues because Petitioner raised factual issues regarding actual innocence in response to the motion. (Docket Nos. 133, 134).[4]

IV. Procedural Defenses

A. Generally

Respondent argues that the Court should not reach the merits of several of Petitioner's claims because Petitioner failed to raise those claims in state court, and has, therefore, procedurally defaulted those claims. Petitioner argues that none of his claims are procedurally defaulted because: (1) all the claims Petitioner raises have been presented to the state courts; (2) the ineffectiveness of Petitioner's counsel in the state courts and prosecutorial misconduct provide cause for any failure to raise a claim; and (3) Petitioner is actually innocent of the crime for which he has been convicted, and of the death penalty.

Subsections (b) and (c) of 28 U.S.C. § 2254 require a habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court. If the petitioner has no remedy currently available in state court, however, the exhaustion requirement is satisfied. *Gray v. Netherland*, 518 U.S. 152, 116 S.Ct. 2074, 2080 (1996); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334 (1989).

[4] Respondent also filed a Motion in Opposition to an Evidentiary Hearing (Docket No. 110), which the Court denied. (Docket No. 116).

Although a claim may be fully exhausted under these circumstances, the petitioner's failure to assert the claim in state court may constitute procedural default. *Id.* As a general rule, procedural default bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court. *Id.* A petitioner may avoid this procedural bar by showing cause for the default, and that prejudice resulted from the default, or by showing that he is actually innocent. *Id.*; *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

B. Exhaustion

First, Petitioner argues that his claims are not procedurally defaulted because they have all been exhausted. Exhaustion requires that petitioners "fairly presen[t]" federal claims to the state courts to provide them with an opportunity to correct alleged violations of its prisoners' federal rights. *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). A claim has been "fairly presented" if the petitioner identified the specific constitutional guarantee allegedly violated, as well as a statement of the facts which entitle the petitioner to relief. *Gray*, 116 S.Ct. at 2081.

It is not enough to make a general reference to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court. *Gray*, 116 S.Ct. at 2081.

Petitioner argues that many of his claims[5] are exhausted because the Tennessee Supreme Court had the independent

[5] Those claims are as follows: whether the indictments against Petitioner violated his Fifth, Eighth and Fourteenth Amendment rights (Amended Petition, ¶ C1); whether Petitioner was denied his rights under the Sixth, Eighth and Fourteenth Amendments because he was not permitted to question potential jurors in voir dire regarding their beliefs about parole eligibility (¶2(l)); whether the evidence was sufficient to support Petitioner's conviction of assault (¶ C3(3)); whether the trial court erred in instructing the jury that it could return a verdict finding Petitioner guilty of either premeditated murder, felony murder, or both ¶C4(l)); whether voir dire, arguments and instructions to the jury

duty to review each claim that could be based upon the record on appeal even if the claim was not raised by the Petitioner. Petitioner cites Tennessee Code Annotated Section 39-2-205(a), which was in effect at the time of Petitioner's trial, to support his argument.

That statute provided for automatic direct review by the Tennessee Supreme Court where the death penalty has been imposed. Tenn. Code Ann. § 39-2-205(a). The statute required that the court review the death sentence to determine: (1) whether the sentence was imposed in an arbitrary fashion; (2) whether the evidence supported the findings of an aggravating circumstance(s); (3) whether the evidence supported the finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance(s) so found; and (4) whether the death sentence is disproportionate to the penalty imposed in

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unconstitutionally defined the elements of premeditation and deliberation in a manner that violated Tennessee law (¶ C4(2)); whether the trial court erred instructing the jury regarding lesser included offenses (¶ C4(3)); whether the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (¶ C4(4)); whether the trial court gave an erroneous definition of reasonable doubt in its instructions to the jury by use of the language "moral certainty" (¶ C4(5); ¶ C7(3)); whether Tennessee law unconstitutionally prohibits presentation of certain specified issues at a capital sentencing hearing (¶ C5); whether the trial court unconstitutionally instructed the jury regarding the felony murder aggravating circumstance (¶ C7(2), ¶ C8); whether the trial court unconstitutionally instructed the jury that sympathy could not be a factor in its sentencing decision (¶ C7(5)); whether the sentencing instructions as a whole were unconstitutional (¶ C6); whether jury instructions regarding mitigating circumstances at the sentencing phase of the trial were unconstitutional (¶¶ C7(6),(7),(8),(9),(10),(11),(12),(13),(14),(15)); whether the Tennessee Death Penalty Statute is unconstitutional (¶ C10); whether the prosecution made improper closing argument at the guilt phase of trial regarding the term "pure pleasure" (¶ D5(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(1)-(3),(5)-(8)).

similar cases. Tenn. Code Ann. § 39-2-205(c) (repealed and replaced by Tenn. Code Ann. § 39-13-206(c)(1)).

The Court is not persuaded that this statute excuses the requirement that the Petitioner present issues to the state courts in the first instance, at least with respect to issues not specifically delineated in the statute. Accepting Petitioner's argument would essentially eviscerate the exhaustion requirement because defendants would have no incentive to raise issues in the state court, The exception Petitioner advocates would also undermine the principles of comity and federalism upon which the exhaustion requirement is based. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991). Accordingly, the statutory requirement that the Tennessee Supreme Court review a death sentence does not satisfy the exhaustion requirement as to those issues not addressed in the statute.[6]

Petitioner argues that the exhaustion doctrine does not require a petitioner to seek discretionary review of a claim before the state's highest court. Petitioner argues that presentation of claims to the Tennessee Court of Criminal Appeals on appeal of the denial of his post-conviction petition was sufficient for purposes of exhaustion because that was the last court to which he was entitled to appeal as of right. Although there is a split of authority on the issue, *see Dolny v. Erickson*, 32 F.3d 381, 383-84 (8th Cir. 1994)(and cases cited therein), the Sixth Circuit has held that a petitioner must seek discretionary review of a claim from a state's highest court in order to satisfy the exhaustion requirement. *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). That the Tennessee Supreme Court exercises only discretionary review of post-conviction matters, therefore, does not excuse the Petitioner from raising his claims before that court.[7]

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[6] Respondent does not allege that Petitioner's claims that track the statute are procedurally defaulted.

[7] Petitioner contends that his ineffective assistance of appellate counsel claim (Amended Petition, ¶ F) is exhausted based on this

Petitioner argues other claims are exhausted for various reasons. First, Petitioner argues that he has exhausted his claim that the evidence at trial was insufficient to support his conviction of assault by presenting it to the Tennessee Supreme Court in his application for discretionary review, (Amended Petition, ¶ C3(3)). Petitioner contends that he presented this claim to the court because it is related to his argument that the evidence was insufficient to support premeditation and deliberation, in that both claims involve Petitioner's condition at the time of the offense. The Court is not persuaded, however, that this claim was fairly presented to the court simply because Petitioner's mental state was a basis for both claims. Thus, Petitioner's sufficiency of the evidence supporting assault claim has not been exhausted.

With respect to his claim that voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation (Amended Petition, (¶ C4(2)), Petitioner argues that he raised the substantial equivalent of this claim by arguing that the evidence was insufficient to support a finding of premeditation or deliberation under *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992), a case involving jury instructions on these elements. Resolving a sufficiency of the evidence claim, however, does not require a court to determine whether the court erred in its jury instructions. This claim was not fairly presented to the state court, and therefore, has not been exhausted.

Petitioner next argues that he has exhausted his claim that the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (Amended Petition, ¶ C4(4)). Petitioner contends that he raised the substantial equivalent of this claim by arguing to the Tennessee Supreme Court on direct appeal that it was fundamentally unfair to predicate his first degree

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argument. Given the Court's rejection of this argument, the exhaustion doctrine applies to bar this claim.

murder conviction solely on the basis of the uncorroborated testimony of co-defendant Harold Devalle Miller. But, as stated above, resolving Petitioner's fundamental fairness claim would not require the court to review the jury instructions on this particular issue. Accordingly, this claim was not fairly presented to the state courts, and has not been exhausted.

Petitioner argues that his claim challenging the constitutionality of the Tennessee Death Penalty Statute (Amended Petition, ¶ C10) was raised on direct appeal to the Tennessee Supreme Court, because he stated in his brief:

> D. As Applied To The Facts Of This Case, The Imposition Of The Death Penalty Constitutes A Deprivation Of Due Process of Laws. Equal Protection Of Laws And Cruel And Inhuman Treatment In Violation Of The Fifth, Eighth And Fourteenth Amendments To The United States Constitution And Article I, Sections Eight And Sixteen Of The Tennessee Constitution And, Further, Is Disproportionate To The Sentence Imposed In Similar Cases
>
> In addition to the arguments set forth in Section II A, B, C and D, *supra*, defendant submits that, taking this case as a whole, the imposition of the death penalty was improper and constitutes a deprivation of life without due process of law and cruel and inhuman treatment. . .

(Brief of the Appellant, at 59 (Addendum 2)). The brief then goes on to address the proportionality issue.

Despite the language in the heading, the brief does not specify, "as applied to the facts of this case," why the death penalty statute is unconstitutional, and what facts support the constitutional challenge. Under these circumstances, the Court concludes that Petitioner did not fairly present his constitutional challenge to the Tennessee Supreme Court on direct appeal.

Petitioner also points out that he challenged the "heinous, atrocious and cruel" aggravating circumstance in his post-conviction application for permission to appeal to the Tennessee Supreme Court. In a footnote, the brief states: "By discussing only the aggravating circumstance of 'heinous, atrocious or cruel,' *infra*, the Appellant does not waive any previously raised constitutional challenges. The Appellant relies on the arguments previously advanced and ruled upon in his Brief to the Court of Criminal Appeals." (Application For Permission To Appeal, at 21 n. 11 (Addendum 15)).

Although the Petitioner referred, in this footnote, to the brief he filed in the Court of Criminal Appeals, he did not attach a copy of that brief to the Application. The Court is not persuaded that referral to arguments made in another document by way of a footnote constitutes a fair presentation of those arguments to the Tennessee Supreme Court. Thus, the Court concludes that this claim has not been exhausted.

In his Amended Petition, Petitioner alleges a number of instances of prosecutorial misconduct, numbered one through eight, with several subissues under each number. In a paragraph under the main heading "Prosecutorial Misconduct," Petitioner states that the prosecution "pursued a consistent course of deception," which violated Petitioner's constitutional rights (Amended Petition, (¶ D)). Respondent has asserted a procedural default defense to most of the claims set forth under this heading.

Petitioner argues, however, that the heading "prosecutorial misconduct," along with the paragraph following that heading, constitute a separate claim to which the Respondent has not asserted a procedural default defense. But the Court does not view this paragraph as a separate claim. The paragraph does not allege specific constitutional violations, nor does it set forth specific facts in connection with those alleged violations. Therefore, Respondent will not be considered to have waived his procedural default defense to the prosecutorial misconduct claims.

For this same reason, the Court rejects Petitioner's argument that certain specific allegations are not defaulted because they fall within this general prosecutorial misconduct claim.[8]

Petitioner contends that his claims regarding the failure to disclose co-defendant Miller's pretrial statements (Amended Petition, ¶¶ D1(2)-(4)) were fairly raised to the Tennessee Supreme Court in his application for permission to appeal because, in that application, he argued that the prosecution made misleading statements in its argument to the jury. (Application For Permission To Appeal, at 9 (Addendum 15)). The Petitioner also argued that the prosecution committed discovery violations, but did not mention Miller's pretrial statements.

The Court is not persuaded that this discovery violation claim has been fairly presented to the Tennessee Supreme Court. Determining whether a prosecutor has made a misleading closing argument is not the same as determining whether the prosecution committed a discovery violation. Thus, Petitioner has not exhausted this claim.

Petitioner next contends that he has exhausted his claim that the prosecution provided misleading statements to the

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[8] These claims include: whether the prosecution should have disclosed the statements of Norman's children (¶ D1(5)), the redacted portion of Detective Garafola's Report (¶ D1(6)), other police reports (¶ D1(8)), the memorandum in the prosecution's file concerning a bank account in Patrick Daniels' name (¶ D1(9)), the statement of George Daniels/laboratory reports (¶¶ D1(10)(11)), and information regarding Petitioner's bank account (¶ D1(12)). 'These claims also include whether the prosecution unconstitutionally influenced Harold Devalle Miller's testimony (¶ D2(l)); whether the prosecution provided false information to MTMHI (¶ D2(2)); whether the prosecution improperly attempted to manipulate Norma Norman's testimony (¶ D2(3)); whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's 1972 murder conviction (¶ D3); whether the prosecution made improper closing arguments at the guilt phase of trial (¶¶ D3(l)-(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(l)-(3),(5)-(8)).

Middle Tennessee Mental Health Institute ("MTMHI"). (Amended Petition, ¶ D2(2)). Petitioner argues that he raised this claim in his application for permission to appeal to the Tennessee Supreme Court by reciting the facts upon which the claim is based. Although Petitioner discussed the prosecutor's letter to MTMHI in the "Statement of the Facts" section of the application, he did not raise this issue in arguing that the prosecution had engaged in misconduct. (Application For Permission To Appeal, at xii-xiii, 7-19 (Addendum 15)). The prosecutorial misconduct claims presented to the Tennessee Supreme Court were limited to Petitioner's allegations that the prosecution failed to disclose certain documents in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the prosecution made a misleading closing argument. (*Id.*) Although Petitioner alleged facts regarding the prosecution's letter to MTMHI, he did not identify the constitutional violation allegedly shown by those facts. Thus, this claim was not fairly presented to the Tennessee Supreme Court, and has not been exhausted.

Respondent argues that Petitioner's ineffective assistance of counsel claim is procedurally defaulted except as to the claim that defense counsel conducted a deficient investigation of Petitioner's mental history (Amended Petition, ¶¶ E1-E2(g)). Petitioner raised the ineffective assistance of counsel claim in his post-conviction petition, and described twenty-seven alleged deficiencies by defense counsel. (First Amended Petition For Post-Conviction Relief, at 3-6 (Addendum 11)). As noted above, the trial court held that defense counsel conducted an inadequate investigation of Petitioner's background and mental health history, but determined that Petitioner was not prejudiced by that deficiency. (Memorandum and Order of the Fifth Circuit Court For Davidson County (Addendum 11)). The Court of Criminal Appeals agreed with that assessment. *Jones v. State*, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995).

In his application for permission to appeal to the Tennessee Supreme Court, Petitioner argued that prejudice had been shown. (Application For Permission To Appeal, at 1-6 (Addendum 15)). Because Petitioner succeeded in demonstrating that trial counsel's performance was deficient in the lower courts, it was not necessary for the Petitioner to raise all those deficiencies again in arguing that his appeal of the prejudice issue should be accepted. The Court concludes that Petitioner fairly presented the ineffective assistance of counsel claims to the Tennessee Supreme Court.[9]

In conclusion, the only claims that have been exhausted by Petitioner and remain to be decided by this Court are: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1)(7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶ A, E1-E2(g)).[10] With the exception of these claims, Petitioner has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. Petitioner may no longer present those claims to the state court, however, because they would be barred by the statute of limitations. *See* Tenn. Code Ann. § 40-30-202.[11] Thus, because Petitioner has no remedy

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[9] For the same reason, the Court also concludes that Petitioner has exhausted his claim that trial counsel failed to test the adversarial process. (Amended Petition, ¶ A).

[10] Respondent has asserted a procedural default defense as to Petitioner's claim that the cumulative effect of all errors at trial violated Petitioner's due process rights. (Amended Petition, ¶ B). In his brief, Petitioner indicates that this is not a separate claim for habeas relief, but is an argument to be considered in determining whether the state court's alleged errors should be considered harmless. Therefore, the Court will not consider this argument as a separate claim.

[11] Section 40-30-202(a) is part of the Post-Conviction Procedure Act of 1995, Tenn. Code Ann. §§ 40-30-201, *et seq*. With some exceptions not applicable here, Section 202(a) provides that a petition for post-conviction relief must be brought within one year of the date of the final action of the highest state appellate court to which an appeal is taken.

currently available in state court, these claims are procedurally defaulted. *See Hannah v. Conley*, 49 F.3d 1193, 1196-97 (6th Cir. 1995).

C. Cause and Prejudice

Petitioner argues that even if his claims are the subject of procedural default, the default should be excused because he can establish cause for the default, and that prejudice resulted from the default. Petitioner also argues that the default should be excused to prevent a fundamental miscarriage of justice in that he is actually innocent.[12]

In order to establish cause, a petitioner must show the procedural default was the result of ineffective assistance of counsel, or "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A petitioner may rely on ineffective assistance of counsel to establish cause only if he has presented that claim to the state courts as an independent constitutional claim, and he shows that counsel's incompetence rises to the level of a constitutional violation. 106 S.Ct. at 2645-46.

In order to demonstrate that an objective impediment provided cause for a procedural default, a petitioner may

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The previous post-conviction statute required that a petition be filed within three years of the date of the final action of the highest state appellate court to which an appeal was taken. Tenn. Code Ann. § 40-30-102 (repealed 1995).

The Tennessee Supreme Court denied Petitioner's petition to rehear, on direct appeal, on May 14, 1990. (Addendum 7). Therefore, Petitioner would be barred, under either statute, from seeking to raise these claims through a post-conviction proceeding in state court.

[12] Petitioner also argues that certain state procedural rules should not prevent adjudication of claims by this Court. It does not appear, however, that Respondent relies on state procedural rules to bar Petitioner's claims. Instead, Respondent argues that the claims at issue were not raised at all in the state courts. *See Teague*, 109 S.Ct. at 1069; *Coleman v. Thompson*, 111 S.Ct. at 2557 n. 1.

show, for example, that "the factual or legal basis for a claim was not reasonably available to counsel," or that "'some interference by officials'" made compliance with the procedural rule impracticable. *Murray*, 106 S.Ct. at 2645 (citations omitted).

The cause and prejudice standard applies to claims that were defaulted on appeal as well as those defaulted at trial. *Murray*, 106 S.Ct. at 2646.

In this case, Petitioner has presented an independent ineffective assistance of trial counsel claim that is not procedurally defaulted. Petitioner has not specified, however, any errors made by trial counsel that prevented any issues from being raised on appeal. In other words, in reviewing Petitioner's case on direct appeal, the Tennessee Supreme Court did not dismiss any of Petitioner's claims based on the failure of trial counsel to preserve those issues at trial. *See State v. Jones*, 789 S.W.2d 545 (Tenn. 1990).

Petitioner may not establish cause by alleging the ineffectiveness of appellate counsel in failing to present certain issues on appeal because this claim has not been presented to the state courts. (*See* Footnote 7, and accompanying text).[13]

Finally, Petitioner may not establish cause by alleging that post-conviction counsel were ineffective in failing to raise certain issues to the state courts. There is no constitutional right to an attorney in state post-conviction proceedings, and therefore, a petitioner cannot claim constitutionally ineffective assistance of counsel regarding those proceedings. *Coleman*, 111 S.Ct. at 2566.[14]

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[13] In any event, the Court notes that a defendant does not have a constitutional right to have every nonfrivolous issue raised on appeal. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 3312-14, 77 L.Ed.2d 987 (1983).

[14] Furthermore, Petitioner has stated that he "is no longer pursuing the issue of ineffective assistance of post-conviction counsel."

Petitioner also argues that cause is established by the "widespread prosecutorial abuse and judicial bias" which tainted the trial and prevented post-conviction counsel from gaining "an adequate picture of the circumstances surrounding the crime and Petitioner's life." (Petitioner's Memorandum In Response To Respondent's Summary Judgment Motions And In Support Of An Evidentiary Hearing, at 50 (Docket No. 113)). Petitioner does not, however, specify how failure to raise a particular claim on direct appeal or during the post-conviction proceeding was impeded by the prosecution or the state court trial judge. Under these circumstances, the Court is not persuaded that an objective impediment prevented Petitioner from presenting claims to the state courts.

In conclusion, Petitioner has not demonstrated cause for his procedural default. Consequently, the Court need not determine whether prejudice resulted from the procedural default.

D. Actual Innocence

A petitioner who is unable to demonstrate cause and prejudice for a procedural default may nonetheless avoid a procedural default bar by demonstrating that he is actually innocent. *Murray*, 106 S.Ct. at 2649. In order to fall within the actual innocence exception to the procedural default bar, a petitioner must provide evidence that negates an element of the crime for which he was convicted, or demonstrates that he was not eligible for the death penalty under the applicable state law. *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 2521-22, 120 L.Ed.2d 269 (1992).

A petitioner who claims he is actually innocent of the crime for which he was convicted must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 115 S.Ct.

(Petitioner's Response To Motion To Compel Disclosure Of Documents From His State Court Attorneys' Files, at 2 (Docket No. 140)).

at 867 (quoting *Murray v. Carrier*, 106 S.Ct. at 2649-2650). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* This standard requires "a stronger showing than that needed to establish prejudice." *Id.* (footnote omitted).

To be credible, this claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 115 S.Ct. at 865.

In order to establish actual innocence of the death penalty, a petitioner must provide "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" eligible for the death penalty under the applicable state law. *Sawyer*, 112 S.Ct. at 2517. In order to make this showing, the petitioner must focus on those elements which render a defendant eligible for the death penalty, *e.g.*, aggravating circumstances, and not on additional mitigating evidence that was not introduced at sentencing. *Sawyer*, 112 S.Ct. at 2523.

Petitioner claims he is actually innocent of first degree premeditated murder based on (1) the testimony of a forensic pathologist regarding blood splattering at the scene of the stabbings; (2) the testimony of a psychiatric expert that Petitioner was insane at the time of the stabbings, and lacked the capacity to deliberate and premeditate; and (3) the lack of credibility of the testimony of the co-defendant, Harold Devalle Miller. Petitioner also claims he is actually innocent of felony murder because there was insufficient proof of the underlying felony -- theft.[15]

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[15] Although he mentions it in his brief, Petitioner does not appear to have asserted a freestanding actual innocence claim (that execution of one who is actually innocent violates the Eighth Amendment) in his Amended Petition. In any event, the standard for this claim is even higher than that

First, Petitioner argues that certain blood splattering evidence supports his claim of actual innocence. At the hearing in this Court, Petitioner presented the testimony of Dr. Kris Sperry, a forensic pathologist, who opined that the assailant would have had blood from the victims' wounds splattered on his body and his clothing. (Transcript of Hearing Beginning on February 6, 1998 ("Transcript"), at 37-38, 77). Petitioner points out, however, that crime lab reports indicate there were no blood stains found on clothes, a coat and two pair of work pants, seized from the Petitioner's apartment two days after the stabbings. (Lab Report, Petitioner's Exhibit 117; Search Warrant, Petitioner's Exhibit 115).

On the other hand, there is no evidence that during the stabbings, Petitioner was wearing the clothes later seized from his apartment. Norma Norman testified that Petitioner was wearing a black coat when he arrived at the apartment. (Addendum I, at 1342-1343). Because Petitioner taped her eyes before the stabbings were committed, however, she could not testify that he was wearing the coat during the stabbings. (Addendum I, at 1375-1378). There was no evidence that he was wearing one of the two pair of pants seized from his apartment two days after the stabbings, or that he had not disposed of the pants worn during the crime.[16]

Although this evidence may have provided a good argument for defense counsel to raise to the jury, the Court is not convinced that reasonable jurors probably would not have convicted Petitioner if they had been presented with this evidence.

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set forth in *Schlup*. Therefore, the Court is not persuaded that Petitioner has established actual innocence as a separate claim. *Schlup*, 115 S.Ct. at 860-62; *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Carriger v. Stewart*, 132 F.3d 463, 476-77 (9th Cir. 1997).

[16] Petitioner's failure to dispose of his coat may be explained by his fondness for the coat, which was given to him by his wife as a birthday gift. (Addendum I, at 1454-1455).

Moreover, both Dr Sperry and Petitioner conveniently overlook the fact that Petitioner admitted that he was guilty at the sentencing phase of the trial:

> ... But what I am saying is, I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. But I don't remember -- you know, I don't remember too much of why that all of a sudden came to me. All I know is that I'm the man that stabbed Mr. Daniel Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman.

(Addendum I, at 1865).

> The only thing that I can recollect is that, when I was over there on this young lady and realized that what I was doing -- I had stopped. The purpose to me, you know, I didn't want -- go over there to hurt nobody. But it was her that I seen underneath me that made me stop. And God spared her life. And after that I left.

(Addendum I, at 1866-67).

> Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting there, that that was true, didn't you?
>
> A. That I was the man, yes.

(Addendum I, at 1893. See also Addendum I, at 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

Next, Petitioner argues that the testimony of Dr. Robert Sadoff supports his claim of actual innocence. Dr. Sadoff opined that, at the time of the stabbings, Petitioner was insane because he lacked the substantial capacity to conform his conduct to the requirements of the law. (Transcript at

523-524).[17] Dr. Sadoff testified that Petitioner was suffering from Post-Traumatic Stress Disorder, which is a mental illness. (Transcript at 455, 457). Dr. Sadoff also diagnosed Petitioner as having a Borderline Personality Disorder, a mental disorder. *Id.*

The Court is not persuaded that Dr. Sadoff's testimony is sufficient to meet the *Schlup* actual innocence standard. First, Dr. Sadoff s diagnosis comes almost twelve years after the crime, and Dr. Sadoff admitted that the passage of time made it more difficult for him to render a diagnosis. (Transcript at 584-585). On the other hand, a mental evaluation of the Petitioner conducted shortly after the stabbings found that Petitioner was competent to stand trial, and that an insanity defense could not be supported. (Petitioner's Exhibit 150). The evaluation was performed by the staff of MTMHI after observing the Petitioner over a thirty-day period in residence. *Id.* Dr. Craddock, who was a member of the MTMHI team that evaluated Petitioner, testified at the hearing in this case. (Transcript at 83-163). Although the MTMHI staff did not possess all the Petitioner's previous institutional records at the time they made their diagnosis, that diagnosis should not be given less weight than one made twelve years later.

In addition, Dr. Sadoff s opinion is based primarily on Petitioner's claim that he could not remember the stabbings. (Transcript at 569). Consequently, Dr. Sadoff opined that Petitioner was probably "dissociating" at the time of the stabbings. (Transcript at 517-518). As a result, according to Dr. Sadoff, if Petitioner was dissociating, he lacked substantial capacity to conform his conduct to the requirements of the law, or to engage in premeditation and deliberation. (Transcript at 523-524, 564).

But Petitioner has not always professed an inability to recall the stabbings. The MTMHI records indicate that

[17] This was the applicable standard for establishing an insanity defense under Tennessee law at the time of Petitioner's trial. *See, e.g., State v. Clayton*, 656 S.W.2d 344, 346 (Tenn.1983).

Petitioner stated he "remembers everything that happened" at the time of the stabbings. (MTMHI Staff Conference Report dated February 19, 1987, Petitioner's Exhibit 150; Transcript at 97). Nor has Petitioner adhered to the same story. Shortly after his arrest, Petitioner claimed that a third party, Sam Blackstock, was involved in the stabbings. (Transcript at 210-212). That story turned out to be false. (*Id.)* Finally, although Petitioner insists that the Court should not rely on Petitioner's testimony during the sentencing hearing, Petitioner clearly admitted his guilt at that time. (Addendum I, at 1865-1867; 1893-1894; 1957; 1961; and 1968). Because Dr. Sadoff's opinion strongly relies on the questionable, self-serving statements of the Petitioner, the Court does not attach a great deal of weight to that opinion.[18]

Petitioner also argues that he is actually innocent because the testimony of co-defendant Miller, which indicated that Petitioner committed the stabbings pursuant to a preconceived plan, is not credible. But this argument is not supported by any "new" evidence, as contemplated by *Schlup*, 115 S.Ct. at 865. *See also McCoy v. Norris*, 125 F.3d 1186, 1190-91 (8th Cir. 1997). Furthermore, the Court is not persuaded that pointing out every inconsistency in Miller's testimony would have led the jury to change its verdict. *See Sawyer*, 112 S.Ct. at 2524 (evidence "brought forward to impeach a prosecution

[18] These would include the statements made by the Petitioner while under hypnosis. Dr. Sadoff admitted that there is no way to determine whether the statements made by the Petitioner while under hypnosis are objective fact. (Transcript at 504-505, 507, 508, 572, 575). The Court notes that Petitioner did not testify at the hearing to memories purportedly recalled during hypnosis.

During the hearing, the Court held that the hypnosis tape offered by the Petitioner was admissible for the limited purpose of establishing what Dr. Sadoff relied upon in forming his opinion. (Transcript at 505-516). The Court also determined that the hypnosis tape did not satisfy the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and declined to admit the statements made on the tape for the truth of the events leading up to and include the stabbings. *(Id.)*

witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness'] account of petitioner's actions"). In other words, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Miller's credibility problems.

Petitioner also fails to present new evidence regarding the robbery. Instead, Petitioner argues that none of the witnesses saw the Petitioner take $300 from the apartment, and that it was just as plausible, based on the evidence, that someone else had taken the money. As the Court has determined in a previous Order (Docket Nos. 156, 157), although the evidence was circumstantial, it was still sufficient to allow the jury to find the elements of robbery beyond a reasonable doubt. Consequently, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Petitioner's arguments regarding the lack of sufficient evidence.

Petitioner also argues that this new evidence also shows he is actually innocent not only of the crime, but also of the death penalty. As discussed above, the *Schlup* Court has pointed out that the standard for establishing actual innocence of the death penalty, set forth in *Sawyer*, is stricter than that required to show actual innocence of the capital crime. The stricter standard requires Petitioner to provide clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. For the reasons explained above, the Court concludes that Petitioner has not shown actual innocence of the death penalty.

Because Petitioner has not established cause and prejudice, or actual innocence, he may not avoid the procedural default of the claims to which Respondent has asserted a procedural default defense. Accordingly, the Court will only address the following claims: Petitioner's prosecutorial misconduct claims involving certain lab reports

and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1), (7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶ A, E1-E2(g)).

V. The Trial Court's Instructions Regarding the "Heinous. Atrocious or Cruel" Aggravating Circumstance and Unanimity

Prior to the hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(l), (4), C8) were unconstitutional. (Docket Nos. 123, 124). For the reasons stated in that opinion, those claims are without merit, and are dismissed.

VI. Brady Violations

As noted above, two of Petitioner's *Brady*[19] claims have been exhausted and are properly before this Court. Petitioner claims that the prosecution should have provided trial counsel with the transcript of his trial in 1972 for murder because, he contends, it would have supported an insanity or mental illness defense. (Amended Petition, ¶¶ D1 (1)). Petitioner also claims that the prosecution should have provided the crime lab analysis indicating that no blood was found on the clothes seized from Petitioner's apartment. (Amended Petition, ¶¶ D1 (7)).

In a series of cases beginning with *Brady v. Maryland*, 83 S.Ct. at 1196-97, the Supreme Court has held that the prosecution must disclose exculpatory evidence to the defense, with or without request. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Suppression of this evidence violates due process if

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[19] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

the evidence is material either to guilt or to punishment, regardless of the good faith of the prosecutor. *Id.*

Withheld evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 105 S.Ct. at 3383. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. 105 S.Ct. at 3384. A showing of materiality does not require the defendant to show that the suppressed evidence would have resulted in the defendant's acquittal. 105 S.Ct. at 3383-84. Materiality is concerned with whether suppression of the evidence undermines confidence in the outcome of the trial. 105 S.Ct. at 3381.

The Supreme Court recently reaffirmed this standard for determining materiality in *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 1567-68, 131 L.Ed.2d 490 (1995). The Court pointed out that "materiality" is not a sufficiency of the evidence test, which would require a defendant to show insufficient evidence to convict after discounting the inculpatory evidence in light of the undisclosed evidence. 115 S.Ct. at 1566. Rather, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (footnote omitted).

The Court explained that in considering materiality, a reviewing court is to assess the collective effect of the suppressed evidence in light of the evidence presented at trial. 115 S.Ct. at 1567. Finally, the Court pointed out that, once constitutional error is found under this standard, there is no need for further harmless-error review because the error cannot be found harmless. 115 S.Ct. at 1566-67.

On appeal of the denial of Petitioner's state post-conviction petition, the Tennessee Court of Criminal Appeals considered this issue as follows:

> Appellant next contends that his conviction and sentence were the result of prosecutorial misconduct

because the state failed to provide him with exculpatory material as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a violation of Brady, appellant must prove (1) the prosecutor suppressed evidence, (2) that the suppressed evidence would have been favorable to the defendant and (3) the materiality of the suppressed evidence.

The evidence claimed to have been suppressed consisted of the transcript of the defendant's 1972 federal murder trial, lab reports on clothing seized from appellant's apartment, a police report about appellant's violent behavior at the time of his arrest, statements by his accomplice, Harold Devalle Miller, a police report suggesting that property belonged to one victim rather than the other, and information relative to the appellant's bank account. None of the above evidence was favorable to the defense. We find no merit to the appellant's claim of prosecutorial misconduct.

Jones v. State, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995).

Whether a *Brady* due process rights violation has occurred presents a mixed question of law and fact which is reviewed de novo. *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir. 1977); *Reese v. Delo*, 94 F.3d 1177, 1183 (8th Cir. 1996); *Hays v. Alabama*, 85 F.3d 1492, 1498 (11th Cir. 1996).

In 1972, Petitioner was tried in a Virginia federal court for the murder of a fellow prisoner, Michael Stein. (Petitioner's Exhibit 131). He was convicted of second degree murder. (Exhibit 105). At that trial, a psychiatrist, Dr. Asot M. Masri, opined that Petitioner had been in a "homosexual panic" when he stabbed Stein.[20] (Petitioner's Exhibit 131, at 48). He

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[20] Dr. Masri characterized homosexuality as a mental disease. (Petitioner's Exhibit 131, at 51).

testified that the Petitioner had a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). The Government called another psychiatrist, Dr. Robert Eardley, who opined that Petitioner was not suffering from a mental disease when he stabbed Stein. (Petitioner's Exhibit 131, at 57-58, 59, 66).

Petitioner argues that this evidence was exculpatory because the State argued at trial that Petitioner did not suffer from any emotional disturbance.

There is no dispute that the prosecutor had this transcript in his possession at some point before trial began. There is also no dispute that he did not provide the transcript to the defense.[21] Respondent contends that the state court was correct in concluding that the transcript was not favorable to the defense because neither psychiatrist opined that the Petitioner was insane.

The Court believes this information was favorable to the Petitioner because the Petitioner had stated his intention to rely on a mental illness defense at trial and sentencing (Transcript at 959-60, 963), and Dr. Masri's testimony

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[21] During the hearing, the prosecutor explained his reasoning:

> Based on all the testimony, I concluded for two reasons, one the lapse of time or I guess you might say the distance in time between the two events and what I call very weak testimony from the defense psychiatrist at the trial, that it was not exculpatory, would have no bearing on explaining whether at the time of this crime he had a mental illness or suffered from any kind of emotional snapping, because the situation in the federal prison was one where even taken in light most favorable to the defendant was triggered as a result of a sexual assault on him.
>
> That wasn't the case here where the defendant sought out the victim and went to the victim and pursued the victim.

(Transcript at 10 15-16).

As for mitigation, the prosecutor testified that his interpretation of the psychological testimony was that during the previous killing, the Petitioner "got angry and snapped." (Transcript, at 1016). There was no evidence, according to the prosecutor, that there were any external circumstances operating on the Petitioner during the 1986 crime. (*Id.*)

supported that defense. The Court is not persuaded, however, that the prosecution's failure to provide the transcript to defense counsel rises to the level of a due process violation because Dr. Masri's testimony was not "material."

In a later section of this Memorandum, the Court concludes that Petitioner received ineffective assistance of counsel because his trial counsel failed to investigate his mental health history, background and other areas of mitigation. The Court is not persuaded, however, that "the proceeding would have been different" if the prosecution had disclosed Dr. Masri's testimony to Petitioner's trial counsel. Petitioner's trial counsel already had various clues that should have led them to investigate Petitioner's mental health history, such as the records of Petitioner's evaluation at MTMHl before trial, and conversations with Petitioner's wife. There is no reason that Dr. Masri's testimony should have been the key element prompting Petitioner's counsel to take action.

Similarly, admission of this testimony as an item of evidence during the guilt phase of the trial would not have affected the result. Had Petitioner's defense counsel hired an expert to opine that Petitioner was insane at the time of the stabbings in 1986, Dr. Masri's testimony about an incident in 1972 could have supported that opinion, but it certainly would not have been vital. Absent an insanity defense, there would be no reason to admit this evidence relating to a prior crime during the guilt phase of the trial.

As for the sentencing phase, Dr. Masri's testimony would have served as an item of mitigation relating both to the prior murder conviction, and to his mental history. But that testimony is only one item of evidence that, as the Court explains below, should have been introduced by trial counsel during the sentencing hearing as mitigation evidence. Standing alone, the Court is not persuaded that the absence of Dr. Masri's testimony undermines confidence in the outcome of the sentencing hearing.

As for the lab reports finding that no blood was found on clothing seized from Petitioner's apartment, there has been no evidence that the prosecutor kept this evidence from the defense. The prosecutor testified that he provided the lab reports to Petitioner's first trial counsel, Neal McAlpin, and Mr. McAlpin testified that he received them. (Transcript at 223-25, 227, 925). Furthermore, the prosecutor testified that he filed the reports with the trial court as part of his response to the Petitioner's discovery request. (Transcript at 911, 926; Supplemental Response Number Two To Defendant's Request For Discovery, Exhibit 19). Under these circumstances, the Court concludes Petitioner's *Brady* claim regarding these lab reports is without merit.

Accordingly, the Court concludes that Petitioner's *Brady* claims are without merit, and are dismissed.

VII. Trial Counsel's Conflict of Interest

Petitioner claims that one of his trial attorneys, Lionel Barrett, had an irreconcilable conflict of interest in representing Petitioner because he was paid a $5,000 retainer by Southeastern Gospel Ministry ("SEGM") member Alan Boyd to represent the Petitioner, and was promised an additional $10,000 that was never paid (Amended Petition, at ¶ El).[22] Sometime after his arrival in Nashville, Petitioner joined SEGM, a nascent religious group that had as its goal "cleaning up" the African-American community by eliminating illegal activities, primarily drug dealing. (Addendum 11, at 15-16). Petitioner's boss, Alan Boyd, co-defendant Miller, and William Beard were also members of the group. *(Id.)* Petitioner and co-defendant Miller both worked for Mr. Boyd at National Baptist Publishing.

Petitioner contends that Mr. Boyd had interests adverse to the Petitioner because Mr. Boyd and SEGM allegedly knew about and took part in the plan to visit the apartment of

[22] $5,000 was inadequate to investigate and prepare this complex case for trial.

Patrick Daniels before the stabbings, and met with the Petitioner and co-defendant Miller after the stabbings. According to the Petitioner, Mr. Boyd retained Mr. Barrett and refused to pay him the full retainer with the effect of preventing Mr. Barrett from investigating the role of SEGM and Mr. Boyd in the crime.

In order to establish a Sixth Amendment violation, the Petitioner must show that an actual conflict of interest affected his lawyer's performance. *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987); *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996).[23] Whether facts give rise to a conflict of interest is a mixed question of fact and law, which is to be reviewed de novo. *Mays*, 77 F.3d at 908.

In reviewing the denial of Petitioner's post-conviction petition, the Tennessee Court of Criminal Appeals found that Mr. Barrett did not know the funds he received came from SEGM member Alan Boyd. *Jones v. State,* 1995 WL 75427, at * 3 (Tenn. Crim. App. Feb. 23, 1995). Petitioner argues that this finding is not fairly supported by the record because Gail Hughes Mann, who delivered the money to Mr. Barrett, testified at the post-conviction hearing that she told Mr. Barrett that the money came from Mr. Boyd. (Addendum 11, at 13).

Both Mr. Barrett and Ms. Mann testified in a hearing before this Court. Mr. Barrett was quite certain he was not aware the funds came from Mr. Boyd. (Transcript at 294, 410). Ms. Mann, on the other hand, was more tentative:

> Q. Did you tell him where the money came from?
>
> A. I don't remember that. I don't know if I told him or not. I probably did. I don't know.

[23] To the extent Petitioner argues that he is not required to show that the conflict "affected his lawyer's performance," this argument has been soundly rejected. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984); *Wilson v. Rogers*, 125 F.3d 856 (Table), 1997 WL 615767 (6th Cir. Oct. 3, 1997).

Q. In the post-conviction proceeding you testified you did tell Mr. Barrett?

A. Probably so.

Q. Can you testify to that today?

A. That I told him?

Q. Yes.

A. I don't remember. I don't know. I might have told him. If I say I told him back then, I did then tell him.

(Transcript at 1281). In her subsequent testimony, Ms. Mann was a bit more definite that she had told Mr. Barrett the source of her funds, Mr. Boyd, would not be providing any more funds. (Transcript at 1288).

Based on the testimony of Mr. Barrett and Ms. Mann, the Court concludes that Mr. Barrett was not aware that Mr. Boyd was the source of the fee, even if Ms. Mann happened to mention it in a conversation with him. Even if Mr. Barrett was aware of the source of the fee, the Court is not persuaded that it affected his representation.

Petitioner argues that the conflict of interest led Mr. Barrett to fail to request attorneys' fees and funds for expert support services. Petitioner also argues this conflict led Mr. Barrett to delay representation and to refuse to ask for a continuance.

In order to accept Petitioner's argument, the Court must find that the source of Mr. Barrett's fees had interests contrary to Petitioner's interest. But, as noted above, the Petitioner himself testified at sentencing that SEGM did not order him to commit the crimes for which he was convicted.

Moreover, even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing. Mr. Barrett elicited testimony about another SEGM member, William Beard, during cross-examination of Mr. Miller at the trial. (Addendum 1, at 1527, 1567). He also elicited

testimony about SEGM from the Petitioner at the sentencing hearing, including testimony that Mr. Boyd supplied him with a shotgun, and William Beard supplied Mr. Miller with a pistol. (Addendum 1, at 1837-1848, 1855-1856).[24] Mr. Barrett also mentioned the Petitioner's connection with the group during his argument. (Addendum 1, at 1960). In addition, Mr. Barrett issued subpoenas for Mr. Boyd and Mr. Beard to appear at the trial. (Transcript at 358).

During the evidentiary hearing in this Court, in response to a question by the Court, Mr. Barrett stated:

> Your Honor, I am as certain as a person can be from something that happened 10 years ago that I absolutely had no knowledge that these funds came from Mr. Boyd.
>
> For the sake of argument only -- even if I had been told these funds came from Allen Boyd, I would have had absolutely no hesitancy in going after him in any way I could and would think he had wasted his money if that is what he was attempting to do.
>
> I am absolutely certain that there was no decision, no single issue of strategy, not one question that Mr. Camp or I asked or did not ask had anything to do with the source of the funds that came from Ms. Hughes or from Allen Boyd.

(Transcript at 410).

The Court is not persuaded that any alleged conflict of interest affected the performance of Mr. Barrett at trial or

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[24] According to co-defendant Devalle Miller's testimony at the post-conviction proceeding, Alan Boyd met with Petitioner and Miller right after the murder of Patrick Daniels, and William Beard helped Miller leave town shortly thereafter. (Addendum II at 26-30). Mr. Boyd purchased the shotgun carried by Petitioner during the murder from a gun dealer in 1983, according to a firearms trace report. (Docket No. 200).

Alan Boyd and William Beard both asserted their Fifth Amendment privilege against self-incrimination at depositions taken in this case. Boyd and Beard effectively refused to answer any questions. (Petitioner's Exhibits 148, 149).

sentencing. Accordingly, Petitioner's conflict of interest claim is without merit, and is dismissed.

VIII. Ineffective Assistance of Counsel

A. Generally

Petitioner contends that trial counsel was ineffective during the guilt phase and during the sentencing phase of his trial (Amended Petition, at ¶ E2). In order to prevail on an ineffective assistance of counsel claim, the burden is on the Petitioner to show: (1) trial counsel's performance was deficient; and (2) actual prejudice resulted from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064-68, 80 L.Ed.2d 674 (1984); *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994).

In order to demonstrate that trial counsel's performance was deficient, a petitioner must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 104 S.Ct. at 2064. The petitioner must show that trial counsel's performance, fell below an objective standard of reasonableness, measured by "prevailing professional norms." *(Id.)*

In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 104 S.Ct. at 2065. The petitioner must overcome the presumption that the challenged action by counsel was sound trial strategy. *(Id.)*

One of the duties of counsel is the duty to investigate his client's case. 104 S.Ct. at 2066. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

In order to show actual prejudice, a petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. A reasonable probability

is a "probability sufficient to undermine confidence in the outcome." *(Id.)*

Thus, when a petitioner challenges his conviction on ineffective assistance of counsel grounds, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt about guilt. 104 S.Ct. at 2068-69. When the petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." 104 S.Ct. at 2069. In assessing prejudice, the court is to assume that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 104 S.Ct. at 2068.

The ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo. 104 S.Ct. at 2070; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir.1996).

Petitioner's contention that his trial counsel, Lionel Barrett and Sumter Camp, were ineffective was first raised on direct appeal by Petitioner's substitute counsel, Richard Dinkins. Petitioner argued that trial counsel should have presented evidence of Petitioner's mental incapacity at sentencing. (Addendum 2, at 57-59). In addressing this claim, the Tennessee Supreme Court stated: "There is no evidence in this record or any other part of [the Petitioner's] extensive criminal record to indicate he was either incompetent to stand trial or at the time this offense was committed. There is nothing in this record to indicate a remand for a determination of defendant's mental status would be appropriate." *State v. Jones*, 789 S.W.2d at 552.

Petitioner raised this issue again in his post-conviction petition. Petitioner based his contention that counsel was ineffective on over twenty separate grounds. (First Amended Petition For Post Conviction Relief, Addendum 11). At the

post-conviction hearing, Petitioner's counsel called Petitioner's initial attorney, Neal McAlpin; trial counsel, Lionel Barrett and Sumter Camp; and appellate counsel, Richard Dinkins. (Addendum 11). Petitioner also called Gail Hughes Mann; Petitioner's co-defendant, Harold Devalle Miller; Petitioner's wife, Susi Bynum Jones; and a psychiatrist, Dr. Barry Nurcombe. *(Id.)*

The post-conviction trial court found that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental health history. (Memorandum and Order entered August 26, 1993, Addendum 11). Specifically, the post-conviction court found that trial counsel failed to investigate as follows:

> 1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
>
> 2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
>
> 3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at DuPont Jr. High School at Ft. Lewis, Washington.
>
> 4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.
>
> 5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records

> in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.
>
> 6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.
>
> 7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.
>
> 8. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.
>
> 9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI per their request.
>
> 10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.
>
> 11. Testimony and files of trial counsel showed that they failed to investigate and obtain available

information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.

12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.

13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

(Memorandum and Order entered August 26, 1993, at 5-6, Addendum 11) (footnote omitted) (emphasis in original).

The court concluded, however, that the failure to investigate did not prejudice the Petitioner because his background also contained harmful information. *(Id.)*

The Tennessee Court of Criminal Appeals agreed with the trial court's decision:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial.

Jones v. State, 1995 WL 75427, at *2.

During the evidentiary hearing in this Court, Petitioner called all the witnesses who testified at the post-conviction proceeding except Dr.Nurcombe and Mr. Miller. In addition, Petitioner presented, for the first time, the live testimony of Petitioner's half-sister, Nancy Lancaster; Petitioner's former fiancé Sarah Roberts Walton; co-defendant Miller's former

attorney, Ross Alderman; mental health experts, Dr. Sadoff, and Dr. Nancy McCoy; Dr. Ray Winbush; and legal expert Brian Stephenson. Petitioner also presented, for the first time, the testimony of Detective Mark Garafola, Elmer H. Bishop, William Delagrange, and Richard Bretzlauf by deposition. (Petitioner's Exhibits 110, 135, 136, 152).

During their testimony before this Court, Mr. Barrett and Mr. Camp admitted most of the deficiencies alleged by the Petitioner. Mr. Barrett was first requested to represent the Petitioner in October, 1996. (Transcript at 326). During the next month, Petitioner's initial counsel, Neal McAlpin, began to withdraw from representation. (Transcript at 233-234). Mr. Barrett did not begin actually working on the case, however, until March, 1987. (Transcript at 336-337). On April 20, 1987, Mr. Barrett first requested the help of Mr. Camp, who was an associate with Mr. Barrett's firm at that time. (Transcript at 271-272, 342, 691). Mr. Camp first began work on the file sometime after May 11, 1987. (Transcript at 691-692). Mr. Barrett took the lead in the case, and Mr. Camp's role was to assist him. (Transcript at 695 - 723). Trial was set for July 6, 1987. (Transcript at 338).

Trial counsel had three to four months to prepare for trial. The investigation they conducted during this time was wholly inadequate. Mr. Barrett admits that he did not obtain Mr. McAlpin's file in the case, or discuss the case in any kind of depth with Mr. McAlpin, even though Mr. McAlpin suggested that he do so. (Transcript at 240-242, 277, 279, 722). Because of that failure, and the subsequent failure to inspect the court file, Petitioner's trial counsel were not aware of the lab reports indicating that no blood was found on clothes seized from Petitioner's apartment. (Transcript at 277, 292, 322, 341, 331-333). Counsel also failed to respond to a request, sent to Mr. McAlpin, from MTMHI staff for background information to be used in their psychiatric evaluation of the Petitioner. (Transcript at 242-243, 331-333).

Mr. Barrett failed to request Petitioner's extensive mental health records, or his educational, prison, or military records. (Transcript at 280-281). This was a serious failure.

Although Mr. Barrett prepared a motion requesting that the trial court declare his client indigent, and approve funds for investigative and expert services, he did not file the motion. This was a significant error. (Transcript at278, 363-367, 701).[25] Mr. Barrett did not consult or hire a mental health expert to perform an independent mental evaluation of his client. (Transcript at 278, 718-719). This was a grave omission.

Mr. Barrett did not introduce any information from the MTMHI records relating to Petitioner's background or mental history at the trial or at sentencing. (Transcript 725). Trial counsel received the MTMHI records only a couple of weeks prior to the trial, and neither recall speaking with any of the MTMHI staff about their report. (Transcript at 280, 282, 352, 716717). These were substantial errors.

Petitioner's attorneys did not call anyone in Petitioner's family to testify during the sentencing hearing. Mr. Barrett testified that someone in his office contacted Petitioner's brother, Mark Jones, before trial, but he refused to assist in Petitioner's defense. (Transcript at 286-289). Mr. Camp testified that he did not contact the Petitioner's brother. (Transcript at 710). At the post-conviction hearing, Petitioner introduced an affidavit from Mark Jones[26] indicating that he had not been contacted by Mr. Barrett's office. (Petitioner's Exhibit 74; PC Exhibit 67). It is undisputed that Petitioner's attorneys did not contact Petitioner's half-sister, Nancy Lancaster, even though she would have been available and willing to testify at the time of trial. (Transcript at 832). Mr.

[25] The Motion was prepared three days after jury selection began. (Transcript at 727). A post-trial motion for indigent status was approved. (Transcript at 376; Petitioner's Exhibit 88).

[26] Mark Jones committed suicide on July 13, 1996. (Transcript at 793).

Barrett did not contact Petitioner's former fiancé, Sarah Roberts Walton, even though the Petitioner told Mr. Barrett about her. (Transcript at 356). These were significant mistakes.

Finally, Mr. Barrett failed to investigate the nature of Petitioner's prior convictions[27]. (Transcript at 281, 708-709, 714-715). This was a substantial error.

As the trial date approached, Mr. Camp suggested that they request a continuance to conduct further investigation, but Mr. Barrett did not act on that suggestion. (Transcript at 279, 705). This was a serious deficiency.

Although both these attorneys have good reputations in the bar, their performance in this case was clearly inadequate. Mr. Barrett critiqued his own performance as follows:

> I think as the trial progressed and on looking back on it now, I think that I should have sought out further psychiatric evaluation. I think it became evident during the course of the trial that Mr. Jones -- and in Mr. Camp's opinion and my opinion had some psychiatric or psychological issues we may not have fully realized early on in the case. . . Based upon the documents that I have now seen subsequent to the trial, I feel that my performance certainly did not satisfy the standards that I adhere to myself as far as pursuing the psychiatric aspect, particularly at the sentencing hearing.

[27] Mr. Barrett testified that the prosecutor introduced him to FBI Agent William Delagrange at trial, and that the agent said he would testify that Petitioner's 1972 conviction was the result of a "drug turf war," and not a homosexually-related killing, as Petitioner contended. (Transcript at 294-299). Given his failure to investigate Petitioner's prior convictions, Mr. Barrett did not have any independent information about the conviction, and therefore, did not introduce mitigating evidence about this conviction at the sentencing hearing. (Transcript at 299). As discussed herein, the 1972 conviction was not over drugs and gangs as represented by the prosecution to defense counsel. The murder concerned homosexual conduct that the jury could have found more mitigating.

(Transcript at 394-395).[28]

Mr. Camp's assessment was even more negative. He testified that he agreed with the state courts that his representation was deficient.

> We did not present the information to this jury so that they would know James Jones, so that in deciding whether he was to live or die they would know this man, they would know this human being. That was our failure.
>
> * * *
>
> ... [W]e didn't give the jury any reason to oppose death on James Jones. We didn't explain to them how James Jones came to be in that courtroom facing them.

(Transcript at 734, 741, 766).)

Thus, this Court, like the state post-conviction trial court and appeals court, finds that trial counsel's performance during the guilt phase and during sentencing was deficient. Unlike those courts, however, this Court concludes that Petitioner suffered prejudice as a result of that deficiency during the sentencing phase of this trial.

Before addressing prejudice at sentencing, the Court will consider whether trial counsel's deficiencies prejudiced Petitioner as to the guilt phase of the trial. Petitioner argues

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[28] Shortly after the trial, defense counsel realized the need to fully consider Petitioner's mental state. Mr. Barrett wrote Mr. Camp the following memorandum on August 26, 1987:

> You will get a copy of communication from James Lee Jones saying that he thinks he is going to get the Nobel Peace Prize. I think he is probably crazy. I think that we should move to have him psychiatrically evaluated prior to the sentencing hearing in view of the United States Supreme Court decision that you cannot execute a person that is crazy. I also think that in the sentencing provision in the code there is some indication that a person can be psychatrically [sic] evaluated. We need to get this done as soon as possible and I would appreciate it if you could prepare the paperwork.

(Petitioner's Exhibit 85).

he was prejudiced because trial counsel did not introduce the lab report indicating that no blood was found on clothes seized from Petitioner's apartment, and because trial counsel failed to obtain an expert to support an insanity defense.

The Court is not persuaded that if trial counsel had presented the lab report to the jury, they would have had a reasonable doubt about guilt. As discussed above, there is no evidence that Petitioner was wearing the clothes seized from his apartment during the stabbings.[29]

Similarly, the Court is persuaded that trial counsel's presentation of a mental health expert to testify on behalf of the Petitioner would have left the jury with a reasonable doubt about Petitioner's guilt. It is not clear that trial counsel would have found an expert to testify that Petitioner was insane at the time of the stabbings. As noted above, Dr.Sadoff's opinions that Petitioner was insane at the time of the offense comes some twelve years after the crime. Furthermore, any testimony to this effect would have been countered by the prosecution with MTMHI's opinion that there was no basis for Petitioner to invoke an insanity defense. Thus, the Court concludes that Petitioner suffered no prejudice at the guilt stage as a result of trial counsels' deficiencies.

As for sentencing, however, the Court concludes that there is more than a reasonable probability that, had trial counsel introduced the mitigation evidence they would have had available after a reasonable investigation, the result of the sentencing would have been different. The Court is of the opinion that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome of the sentencing.

In evaluating the prejudice at sentencing, it is important to keep in mind the nature of mitigation evidence during the

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[29] Petitioner also ignores the fact that he admitted his guilt at sentencing. (Addendum I, at 1865, lines 5-12; 1866, line 25 through 1867, line 6; 1893, lines 4-8; 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

sentencing proceeding. In the "eligibility" phase of the sentencing proceeding, the jury narrows the class of defendants "eligible" for the death penalty, generally by determining whether certain well-defined aggravating circumstances are applicable to the case. *Buchanan v. Angèlone*, ___ U.S. ___, 118 S.Ct. 757, 761, ___ L.Ed.2d ___ (1998); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980). During the "selection" phase, the jury determines whether to impose the death penalty on a particular defendant. *Buchanan*, 118 S.Ct. at 761. In regard to making this "selection" decision, the Supreme Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." *Id.* Indeed, the Court has consistently held that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Id.*

Mitigating evidence relevant to the selection decision includes "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2946, 106 L.Ed.2d 256 (1989). As the Supreme Court has explained: "If a sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" 109 S.Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)). The sentencing decision should reflect "a reasoned moral response to the defendant's background, character, and crime." *Id.*

Thus, there is a broad array of evidence that is considered to be relevant to mitigation. In addition, the rules of evidence do not apply to the presentation of that evidence. During the

relevant time period, Tennessee Code Annotated Section 39-2-203 (c) provided:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(Exhibit 155).[30] Consequently, Petitioner's counsel were not constrained by evidentiary restrictions in introducing mitigation evidence at sentencing.

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[30] Thus, this Court has used a similar standard in determining whether prejudice has been established in light of the evidence that could have been admitted at the sentencing hearing. In that regard, the Court notes that Rule 7 of the Rules Governing Section 2254 Cases provides that the habeas corpus record may be expanded "by the inclusion of additional materials relevant to the determination of the merits of the petition." Habeas Corpus Rule 7(a). The Rule indicates that copies of letters, documents, exhibits, and affidavits may be included in the expanded record. Habeas Corpus Rule 7(b). The court "may require" the authentication of material added to the record under the Rule. Habeas Corpus Rule 7(d). Thus, Rule 7 contemplates a relaxed application of the hearsay, best evidence, authentication, and other evidentiary rules under the Federal Rules of Evidence, Liebman, *Federal Habeas Corpus Practice and Procedure*. § 19.5, at 532 (2d ed. 1994).

In this case, there was an abundance of mitigation evidence available that was never used at trial. For example, trial counsels' reasonable investigation would have produced information about Petitioner's childhood abuse by his father, a military policeman. Trial counsel could have introduced evidence about this abuse through descriptions contained in some of Petitioner's mental health records, through the testimony of Petitioner's step-sister, Petitioner's wife, Petitioner's now-deceased brother, and Petitioner's former fiancé.[31]

During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. (Transcript at 786, 81[illegible] 822-823, 832, 838-839). Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. (Transcript at 786-787). Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. (Transcript at 787).[32] Petitioner's mother later married Petitioner's father, James Jones, Sr. (Transcript at 793-794). Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.

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[31] The affidavit of Mark Jones, Petitioner's deceased brother, which was introduced at the post-conviction hearing, confirms Petitioner's statements about the abuse and other difficulties he encountered during his childhood. (Mark Jones Affidavit, ¶ 5, Petitioner's Exhibit 74). Sarah Roberts Walton and Susi Bynum testified in this Court about Petitioner's previous statements to them that he had suffered abuse as a child. (Transcript at 1191-1192; February 19, 1987 -- MTMHI Social History, Petitioner's Collective Exhibit 150).

[32] As a result, Ms. Lancaster was unable to testify as to her age or birthday. (Transcript at 787). The taxi driver went back to the woods, retrieved the children, and turned them over to the state. *Id.*

Petitioner's statements to mental health providers provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. (Transcript at 629-634; Petitioner's Collective Exhibit 150; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9). Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. (Transcript at 475, 631, 818; Petitioner's Collective Exhibit 150). Petitioner's father struck Petitioner's penis with a baseball bat. (Transcript at 475, 632). To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. (Transcript at 634). None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury. This was a grave omission by defense counsel.

This, of course, is not to suggest that people who are abused as children should get away with murder. People with bad childhoods can be sentenced to death. But, the Constitution requires that these significant facts should have been presented to the jury at sentencing by counsel.

Petitioner's school and mental health records indicate that Petitioner's family lived in several different locations, and that Petitioner had undergone mental evaluations several times during his childhood. Petitioner ran away from home several times, and eventually, at 15, left home for good. (Mark Jones Affidavit at ¶ 4, Petitioner's Collective Exhibit 74; Transcript at 630).

A reasonable investigation would have produced information about Petitioner's mental history. A review of the MTMHI records, which trial counsel had in their possession before trial, would have indicated that Petitioner had had prior mental evaluations, that he had served in the army, and had spent several years in prison. (Petitioner's Collective Exhibit 150). Petitioner's school, military and

prison records reveal that Petitioner had been diagnosed in 1964 as having "paranoid personality" (December 11, 1964 -- Western State Hospital, Tacoma, Washington, Respondent's Collective Exhibit 8) and, in 1971, as having a "passive aggressive personality, aggressive type." (May 11, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142). These records also describe the Petitioner as: "very sick" and in need of immediate commitment (November 12, 1964 -- Richard Stiles of Dupont Junior High School, Respondent's Collective Exhibit 8), "in serious need of therapy" (May 24, 1965 -- Sayre Junior High School Staff, Respondent's Collective Exhibit 7); and "highly disturbed." (December 30, 1970 -- FR, Petersburg, Petitioner's Collective Exhibit 142; Respondent's Collective Exhibit 6, Tab 8). The records also reflect numerous suicide attempts (February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9; April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; March 19, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142; June, 1972 -- FCI, Tallahassee, Addendum 11, PC Exhibit). None of this evidence was offered to the jury. This was significant error by counsel.

Petitioner also had a family history of serious mental conditions. Petitioner's sister, Sylvia, attempted suicide on multiple occasions and was institutionalized several times for mental health problems. (Transcript at 803, 815, 626). Petitioner's brother, Mark, committed suicide while this case was pending in this Court.[33] To call the Jones family dysfunctional would be an understatement. (Transcript at 626).

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[33] Sylvia Jones, as a teenager, had a child out of wedlock by her own father according to Ms. Lancaster's uncorroborated view of the family's history. (Transcript at 793-795). The whereabouts of Sylvia Jones is unknown. Mark Jones committed suicide on July 13, 1996. (Transcript at 793). The suicide was within days of his arrest for sexually and physically abusing his children. (Transcript at 627).

Had counsel conducted an in-depth interview before calling Susi Bynum to testify at sentencing, they would have gathered more evidence regarding Petitioner's mental health. They would have learned about Petitioner's belief that he and his wife would have the next Messiah; Petitioner's having carried on conversations with nonexistent people and animals; and his having banged his head against the wall on various occasions. (Transcript at 1224, 1225, 1229, 1216).[34] Again, none of this evidence was made known to the jury. Ms. Bynum testified that she even told Mr. Barrett that he should have a psychiatrist examine the Petitioner before the trial. (Transcript at 1250). These were serious deficiencies by defense counsel.

Had trial counsel heeded Ms. Bynum's suggestion and hired a mental health professional to evaluate the Petitioner, or had they interviewed MTMHFs Dr. Craddock, they could have presented evidence that Petitioner had, at the very least, exhibited symptoms of a Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior. (Transcript at 129-132; 140). A mental health professional, like Dr. McCoy, could have offered testimony about Petitioner's background and mental history, and could have offered an explanation placing in context the negative aspects of Petitioner's past. (Transcript at 613-663). By describing Petitioner's history of earnestly seeking a religious faith with which to align himself, Dr. McCoy's testimony would have supported the notion that Petitioner had been strongly influenced by the SEGM. None of this was put into evidence before the jury. The failure of counsel to do so was a serious error.

Trial counsel could have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society during the year before he came to Tennessee. If they had heeded Petitioner's

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[34] The Court notes that the MTMHI files also revealed much of this same information. (Petitioner's Collective Exhibit 150).

suggestion that they talk with Sarah Roberts Walton, Petitioner's former fiancé, they could have learned that after Petitioner was released from prison in Chicago, in 1983, he was hard-working and giving. Ms. Walton, now an attorney for the State of Maine,[35] testified that when she knew the Petitioner in 1983, he held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence. (Transcript at 1181, 1195-1196, 1197, 1205; Bretzlauf deposition, at 14-15, 17).[36] Ms. Walton described the Petitioner as gentle, caring, and filled with dignity; a person with whom she shared a sincere Christian belief (Transcript at 1204-1205). The jury heard nothing of the sort from any witness. This was a very significant failure by defense counsel.

The Court finds the testimony of Ms. Walton to be extremely credible. The content of her testimony, as well as her demeanor, made her a compelling mitigation witness on behalf of Petitioner for purposes of sentencing. Ms. Walton's testimony, based on personal knowledge, added a humanizing dimension to the life history and character of the Petitioner, good and bad, that was absent from any prior proceeding in state court, and yet could have been presented to the jury, had trial counsel conducted a reasonable investigation.

Had defense counsel learned more about the 1972 murder conviction, they could have presented evidence to the jury that the killing occurred when Petitioner approached the victim, Michael Stein, in his cell to confront him about spreading rumors that Petitioner had engaged in homosexual

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[35] Ms. Walton has represented the State of Maine on two murder appeals. (Transcript at 1182).

[36] Ms. Walton ultimately broke off the engagement because she was concerned that Petitioner had psychological problems. (Transcript at 1189-1190). Petitioner subsequently moved to Tennessee the year before the stabbings to be close to his brother, Mark Jones, who was stationed at Fort Campbell. (Transcript at 1195).

conduct, and that Petitioner stabbed Stein during that confrontation. (Bishop Deposition, at 22-23, 24-25, 26, Petitioner's Exhibit 135; Delagrange Deposition, at 18-19, Petitioner's Exhibit 136; Petitioner's statement dated April 2, 1972, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Letter dated April 15, 1987 from David G. Lowe to John Zimmerman, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Memo dated April 7, 1972 from H.R. Hogan to Norman A. Carlson, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136).[37] The prison murder was not about drugs and gangs as represented by the prosecution to defense counsel.

More importantly, Dr. Masri testified at the 1972 murder trial that Petitioner had a "homosexual panic" and lost control when he killed Stein. (Petitioner's Exhibit 131, at 48). As noted above, Dr. Masri also diagnosed the Petitioner as having a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). Although this information does not provide a justification for the murder, it does provide the jury with some information upon which to evaluate it. Without some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he was not deserving of any leniency. The jury heard none of this evidence. Again, defense counsel made a substantial mistake.

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[37] In response to a claim made by Mrs. Stein after her son's death, representatives of the federal institution where he had been incarcerated took the position that:

> Mr. Stein was a member of a group of inmates who were attempting to apply extortionate pressures on Jones to submit to Stein's demands for homosexual activities. The assault itself on April 1 arose out of an attempted assault on Jones approximately two weeks earlier by members of this group.

(Petitioner's Collective Exhibit 142; Bishop Deposition, at 25, Exhibit 135).

Instead, at the sentencing hearing, the jury heard only two witnesses for the defense, the Petitioner and his wife. The defense was breathtakingly brief in content, and lacking in quality, and quantity. (Addendum 1, at 1836-1930). Petitioner's testimony on direct was essentially limited to his relationship with SEGM, his account of the events surrounding the stabbings, and a plea for his life. (Addendum 1, at 1836-1870). During cross-examination, the Petitioner initially lost his composure, and was not particularly articulate in answering the prosecutor's questions. (Addendum 1, at 1870-1905). Mr. Camp described the Petitioner's performance as "one of the saddest things I have seen in my legal career." (Transcript at 731).[38]

The only line of questioning put to Petitioner's wife, Susi Bynum Jones, related to whether she had written some bad checks before Petitioner was incarcerated. (Addendum 1, at 1919-1929).[39] Counsel did not even attempt to elicit testimony from Mrs. Jones that she loved her husband, found good in him, or hoped he would not be executed.[40]

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[38] Mr. Camp described trial counsels' deficiencies regarding Petitioner's testimony:

> It is my opinion that Mr. Jones was not prepared to go on the stand, that because of what I perceived to be his mental health problems that it would be hard for him to have been successful on the stand because we had not provided the factual foundation that the jury needed to be able to hear this man in context, that all they got was literally this man begging for his life. And it was more than he could handle and that he just broke down.

(Transcript, at 731).

[39] Even though he conducted the direct examination of the Petitioner's wife, the only mitigation witness offered besides the Petitioner, Mr. Camp did not conduct an interview with her prior to trial. (Transcript, at 724; 1248, 1250).

[40] Ms. Jones spoke effervescently about her husband at the hearing in this case. "Well, when I first met James, he opened up his mouth, it was like thunder from heaven... I was fascinated with James...he was different, just different from any man I had ever met... he wanted to do something for the world. I was intrigued by that." (Transcript, at 1216).

The jury in this case heard no witnesses who expressed a concern whether Petitioner lived or died, even though such witnesses were available and known to defense counsel. This was a grievous flaw.

As Respondent argues, and the state courts found, there was also a considerable amount of negative evidence that the prosecution could have introduced during the sentencing hearing, That evidence includes a criminal record which indicates that Petitioner was convicted of assault at the age of 15, and two more assaults at the age of 19. (Petitioner's Exhibit 105; Petitioner's Exhibit 146; Respondent's Collective Exhibit 9; Respondent's Collective Exhibit 10). As noted above, Petitioner was convicted of the second degree murder of Michael Stein at the age of 21. (Petitioner's Exhibit 105).

Petitioner has been diagnosed as having a sociopathic personality disturbance with antisocial reaction and mild depression, (March 10, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9), as having an anti-social personality (November 7, 1968 -Fort Meade, Maryland, Respondent's Collective Exhibit 10; June, 1977 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 59), and as having a psychopathic personality. (January 13, 1978 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 67).

Petitioner has also been diagnosed as having no mental illness. (April 15, 1969 - Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; December 31, 1969 -- St. Elizabeth's Hospital, Respondent's Collective Exhibit 11; April, 1970 -- Dr. Angus, Respondent's Collective Exhibit 6, Tab 10 1; Dr. Eardley testimony at Stein murder trial, Petitioner's Exhibit 131, at 57-58, 59, 66).

The prosecution could have introduced evidence that during his many years in prison, Petitioner was involved in numerous citations for misconduct, including possession of a knife. (Respondent's Collective Exhibit 6). Prison records

would also show that Petitioner escaped shortly before his parole date in 1982, but was recaptured a few months later. (Respondent's Collective Exhibit 6, Tab 94). While on escape, Petitioner was a witness in a murder case.

Petitioner's army records indicate that during his service in the army, Petitioner was absent without leave on more than one occasion, and ultimately, was discharged under conditions other than honorable. (Respondent's Collective Exhibit 10).

Finally, Petitioner's school records indicate that he was suspended from school for threatening a teacher with a knife. (May 24, 1965 -- Sayre Junior High School, April 25, 1966 -- Shaw Junior High School, Respondent's Collective Exhibit 7; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9).

Notwithstanding this negative evidence, however, the Court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution. (Tenn. Code Ann. § 39-2-203; Exhibit 155). No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty.

This is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence -- none -- being offered to the jury despite its availability and abundance. Defense counsel was substantially ineffective and Petitioner was thereby deprived of a constitutionally fair trial.

Petitioner stated it succinctly to the jury at sentencing:

> I don't know you. You don't know me. So, it ain't no feeling there what you should do to me.

(Addendum 1, at 1869, lines 15-16).

According to the prosecutor's assessment after trial, given the paucity of evidence that was presented by Petitioner's attorneys, the jury had little reason to hesitate in imposing the death penalty: "The jurors all expressed to us their satisfaction with their verdict and were quite surprised at their own ability to impose the death penalty on this particular man with no reluctance whatsoever." (Letter dated July 17, 1987 from John Zimmerman to David G. Lowe; Petitioner's Collective Exhibit 136).

The Court acknowledges that Lionel Barrett and Sumter Camp have good reputations in the Nashville bar for being fine criminal defense lawyers. This case illustrates that lawyers do not make cases based on their reputations. A lawyer must actually work on each case. Cases are made through factual investigation, research, writing, witness preparation, trial strategy, and a bit of good fortune. In this case, the hard work required was simply not done. This Court agrees with the state post-conviction trial and appellate courts that Mr. Barrett and Mr. Camp provided inadequate representation. Good lawyers can and do fail. Here, Mr. Barrett and Mr. Camp utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death.[41] This is not a case of harmless error.

This conclusion is not one the Court reaches casually. The Court is mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and finality of court judgments. This Court has no interest in simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the

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[41] Mr. Barrett as lead counsel, and Mr. Camp as assistant counsel, each had an independent duty to provide effective assistance of counsel.

jury or the state courts,[42] and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand. The Constitution of the United States, and this Court's duty to uphold its principles, mandate the issuance of the writ of habeas corpus as to Petitioner's death sentence.

IX. Conclusion

All Petitioner's claims are procedurally defaulted except Petitioner's *Brady* claims, trial counsel conflict of interest claim, the ineffective assistance of counsel claim, and those claims already addressed by the Court in previous orders. The Court concludes that Petitioner's *Brady* claims, and conflict of interest claims, are without merit, and they are dismissed.

With respect to Petitioner's ineffective assistance of counsel claim, the Court concludes that Petitioner received ineffective assistance of counsel during the sentencing phase of his trial, and therefore, Petitioner's petition for a writ of habeas corpus relief is granted as to that claim. Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. As noted above, Petitioner is also serving two consecutive life terms for assault with intent to commit murder and armed robbery and shall remain incarcerated.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

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[42] For example, Nancy Lancaster, Sarah Roberts Walton, Robert Sadoff, Diana McCoy, Kris Sperry, Raymond Winbush and Brian Stephenson were not called as witnesses in the state post-conviction proceeding.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-6568/98-6569

ABU-ALI ABDUR' RAHMAN,
Petitioner-Appellant
vs.
RICKY BELL
Respondent-Appellee

Appeal From The United States District Court
For The Middle District Of Tennessee
At Nashville
No. 96-00380--Todd J. Campbell, District Judge.

Argued: January 31, 2000
Decided and Filed: September 13, 2000

Before: SILER, BATCHELDER, and COLE,
Circuit Judges.

COUNSEL

ARGUED: Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, for Appellee. **ON BRIEF:** Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, Brian K.

Frazier, NEAL & HARWELL, Nashville, Tennessee, for Appellee.

OPINION

SILER, Circuit Judge. Respondent, Ricky Bell, Warden ("State"), appeals the issuance of a writ of habeas corpus to Petitioner, Abu-Ali Abdur'Rahman ("Petitioner"),[1] vacating Petitioner's sentence of death for first-degree murder on the grounds of ineffective assistance of counsel at the sentencing phase of Petitioner's trial. Additionally, Petitioner cross-appeals the denial of his petition for a writ of habeas corpus seeking relief from his conviction for first-degree murder. We reverse the district court's finding that Petitioner was prejudiced by his trial counsel's deficient performance at the sentencing stage and vacate the portion of the district court's judgment granting the petition for a writ of habeas corpus as to the death sentence. Additionally, we affirm the portion of the district court's judgment denying the petition for a writ of habeas corpus as to the conviction.

I. BACKGROUND

Petitioner was tried and convicted of first-degree murder, assault with intent to commit murder, and armed robbery. He received the death penalty for the murder conviction and two consecutive life terms for the each of the other convictions. The death sentence was imposed pursuant to the jury's finding of three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; and (3) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or

[1] Petitioner was originally named James Lee Jones, but he changed his name to Abu-Ali Abdur'Rahman.

attempting to commit, any first-degree murder, arson, rape, robbery, burglary, theft, or kidnapping. Petitioner's convictions arose out of an offense that occurred in 1986.

On February 16, 1986, Petitioner purchased a small amount of marijuana from Patrick Daniels at the duplex in which Daniels lived in Nashville, Tennessee. Petitioner and Harold Devalle Miller later agreed to rob Daniels. The plan was for Petitioner to enter the duplex under the pretext of making a drug purchase, at which point Miller would force his way into the duplex and "rob" both Daniels and Petitioner with a shotgun that Petitioner had supplied. This plan was never executed, however, as Miller became too frightened to go through with it. Petitioner then formulated a second plan to rob Daniels, this time using a knife to avoid making too much noise.

On February 17, 1986, Petitioner, armed with a shotgun, and Miller, armed with an unloaded pistol, entered the duplex under the pretext of making a drug purchase. Petitioner and Miller displayed their firearms and forced Daniels and his girlfriend, Norma Norman, to the floor. Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes, and mouth. After stealing Daniels's bank card, Petitioner forced Daniels to reveal his PIN number. Petitioner also searched the house and found some marijuana in some sofa cushions.

Petitioner then told Daniels that he had been sent from Chicago to "clean up everything" and that he was there to teach Daniels a lesson. Petitioner obtained a butcher knife from the kitchen and stabbed Daniels six times in the chest, penetrating his heart four times. Prior to and during the stabbing, Daniels was crying and begging Petitioner not to hurt anyone. After Daniels became motionless, Petitioner stabbed Norman in the back several times, but Miller pulled Petitioner away and the two men fled, leaving the knife in Norman's back. Daniels died as the result of his wounds, but

Norman survived. Petitioner and Miller also took $300 from a box in Norman's bedroom.

At trial, Petitioner argued that the real motivation for the crime was born out of the influence of his membership in a "quasi-religious paramilitary group" called the Southeastern Gospel Ministry ("SEGM"). Petitioner had a long criminal history, including a conviction for second-degree murder in 1972 and a conviction for assault with a dangerous weapon (a knife) in 1970. Following his incarceration for these offenses, he moved to a halfway house in Nashville. While living at the halfway house he worked for an organization called the Baptist Publishing Board, and eventually met Allen Boyd, one of the Board's owners, and Boyd's associate, William Beard. Boyd and Beard were the leaders of the SEGM; Miller was also a member of the SEGM. One of the alleged goals of the SEGM was to cleanse the black community of drug dealers and other undesirable elements. Boyd allegedly furnished the shotgun used during the offense and assisted Petitioner and Miller after the offense, including giving Miller some money to flee.

Petitioner was initially represented by Neal McAlpin, who was asked by Boyd to take on the representation. Boyd allegedly indicated to McAlpin that he would be paying Petitioner's attorney's fees. However, McAlpin subsequently determined that Boyd was a member of the SEGM. With Boyd being the source of his fees, as well as perhaps being involved in the crime, McAlpin felt that a conflict of interest existed within the third-party fee arrangement and that he could not continue the representation. Gail Hughes, an associate of Boyd's, then requested that Lionel Barrett represent Petitioner. Barrett agreed to do so for a retainer fee of $15,000, $5,000 of which was paid to him fairly soon, though he never inquired as to the source of the funds. Barrett and another attorney, Sumter Camp, represented Petitioner at trial.

Petitioner alleges that this representation was ineffective throughout the trial, including both the guilt phase and the sentencing phase. Barrett testified that at the time he received the first $5,000 of the retainer he decided he was not going to perform any work on the case until he received the balance of the retainer fee, a balance that was never paid. Petitioner also claims that Barrett performed no work on the case until he filed pre-trial motions. Petitioner alleges that Barrett's performance as counsel was ineffective due to failure to: (1) investigate; (2) present potentially exculpatory evidence; and (3) present mitigating evidence at the sentencing stage.

His conviction and sentence were affirmed by the Tennessee Supreme Court in *State v. Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990). He sought post-conviction relief in the state trial court which conducted a hearing, made findings, and denied relief. The judgment was affirmed in *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995), and the Tennessee Supreme Court denied review. The United States Supreme Court denied a petition for a writ of certiorari in *Jones v. Tennessee*, 516 U.S. 1122 (1996). Petitioner later filed this petition for a writ of habeas corpus, challenging both his conviction and sentence. After Petitioner's motion for partial summary judgment was denied, the district court held an evidentiary hearing to address the merits of his habeas petition. The district court granted the writ on Petitioner's claim of ineffective assistance of counsel at the sentencing stage due to counsel's failure to present mitigating evidence despite its availability. However, the district court denied Petitioner's claim of ineffective assistance of counsel at the guilt stage, holding that although the performance of Barrett and Camp was deficient, Petitioner suffered no prejudice thereby. *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998). This is an appeal from that decision.

II. DISCUSSION

A. State's Appeal Challenging the Judgment Granting the Petition for a Writ of Habeas Corpus as to the Death Sentence

1. Presumption of Correctness Under 28 U.S.C. § 2254

The State argues that the district court improperly dispensed with the presumption of correctness that is to be accorded to state court findings of fact under 28 U.S.C. § 2254(d)[2] without providing a statement of its reasons for

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[2] 28 U.S.C. § 2254(d) (repealed), in effect when the instant petition was filed, states:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

doing so as required by *Sumner v. Mata*, 449 U.S. 539 (1981), and *Mitchell v. Rees*, 114 F.3d 571 (6th Cir. 1997). Petitioner responds that claims of ineffective assistance of counsel involve mixed questions of law and fact that are not accorded the presumption of correctness under *Strickland v. Washington*, 466 U.S. 668 (1984).

The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the following factual findings in the process:

> 1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
>
> 2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
>
> 3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological

assessment at age 14 by the school psychologist at Dupont Jr. High School at Ft. Lewis, Washington.

4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.

5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.

6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.

7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.

8. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.

9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington,

D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI [Middle Tennessee Mental Health Institute] per their request.

10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.

11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.

12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.

13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

Abdur'Rahman, 999 F.Supp. at 1093. The district court referred to these findings in its opinion partially granting habeas relief, but did not address the presumption of correctness that arguably applied to them under 28 U.S.C. § 2254. Instead, citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984), and *Queen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996), it merely noted that "[t]he ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo." *Abdur'Rahman*, 999 F.Supp. at 1092.

This was an accurate statement of the law by the district court, though not a complete one. A close reading of the relevant portion of *Strickland* indicates that while the ultimate question of ineffective assistance of counsel is a mixed question of law and fact, the factual findings of state courts

underlying such an analysis are accorded the presumption of correctness:

> **Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d),** and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698 (emphasis added). Thus, the state post-conviction trial court's findings of fact underlying its ineffectiveness inquiry should have been presumed correct.

This presumption is not mandatory because a district court may preclude its application upon the finding of any one of the listed exceptions in 28 U.S.C. § 2254(d). However, in order to do so "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Sumner*, 449 U.S. at 551. In the recent opinion in *Mitchell v. Rees*, this court discussed this requirement.

> We begin with the application of 28 U.S.C. § 2254(d), which establishes a presumption of correctness for factual determinations made by the state courts whose judgments are challenged by the federal habeas petitioner. The Supreme Court, in *Sumner v. Mata*, held that § 2254(d) mandated that the presumption of correctness be applied by the habeas court to a finding of the state appellate court that "'the facts of the present case' did not adequately support respondent's claim." The Court went on to lay down the rule that "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning

> which led it to conclude that the state finding was 'not fairly supported by the record.'" The reason for this requirement, the Court explained, is that "[n]o court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)." And in a footnote, the Court further explained that "the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of [federal court] jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, and have repeatedly since reaffirmed, 'it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded.'"
>
> . . . It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"

Mitchell, 114 F.3d at 575-77 (citations omitted). Thus, the district court committed the same error by apparently dispensing with the presumption of correctness without a statement of its reasons for granting relief notwithstanding the provisions of § 2254(d).

Relying solely upon the erroneous argument that the presumption of correctness does not apply to the post-conviction trial court's findings of fact, Petitioner fails to argue that any one of the listed exceptions in § 2254(d) applies and requires that the court dispense with the presumption of correctness. However, he argues that § 2254(d)(8) would entitle him to an evidentiary hearing, pointing to evidence in the record allegedly showing that he

did not receive a full and fair hearing in state court at trial, during post-conviction proceedings, and on appeal. The State argues that due to Petitioner's formal presence before the state trial and appellate courts, his ability to call witnesses and otherwise present evidence, and his pursuit of his claims on appeal, he cannot be heard to claim that he did not receive a full and fair hearing. This position is correct. *See Andrews v. Collins*, 21 F.3d 612, 619 (5th Cir. 1994) (noting that the opportunity to present evidence, to present witnesses, and to fully cross-examine prosecution witnesses supports the finding of a full and fair hearing); *see also Sumner*, 449 U.S. at 546 (stating that "[s]ince that court [state appellate court] was requested to determine the issue by respondent [the convicted murderer], we do not think he may now be heard to assert that its proceeding was not a 'hearing' within the meaning of § 2254(d)."). Thus, because Petitioner received a full and fair hearing the presumption of correctness applies.

It is clear that the court erred in not addressing the presumption of correctness as required by *Sumner*, *Strickland*, and *Mitchell*. However, it is unclear as to whether the district court held that the presumption of correctness did not apply. This ambiguity arises because the district court ordered an evidentiary hearing and received evidence that was not presented in any of the state court proceedings. Additionally, it considered the new evidence in its opinion partially granting habeas relief to Petitioner, yet failed to explicitly find whether the new evidence contradicted and possibly rebutted the presumption of correctness, or merely supplemented the post-conviction trial court's findings of fact.

Presumably, however, because the court simply exercised de novo review under its mistaken interpretation of *Strickland* it did dispense with the presumption of correctness. Thus, the district court erred by failing to recognize that the presumption of correctness applied to the post-conviction trial court's findings of fact and erred by failing to include in its opinion the reasoning why the presumption of correctness did

not apply. Unlike *Mitchell*, however, this error does not require a remand because we hold that the district court properly ordered an evidentiary hearing and properly considered the evidence it heard.

2. Inherent Discretion to Order an Evidentiary Hearing

Applying the presumption of correctness under § 2254(d) is an entirely separate and distinct issue from whether a district court may or is required to order an evidentiary hearing to settle allegedly disputed issues of material fact. However, as a practical matter, when a district court finds that the presumption of correctness does not apply due to one of the listed exceptions in § 2254(d), a hearing is probably warranted. As discussed below, this is an issue that is independent of whether a habeas Petitioner is *entitled* to an evidentiary hearing. This latter issue is not raised by the instant appeal, because the district court properly ordered an evidentiary hearing pursuant to its inherent discretionary authority.

The district court ordered an evidentiary hearing "to resolve the numerous complex factual and legal issues presented." The State argues that the district court abused its discretion in ordering an evidentiary hearing because *Mitchell* does not allow for such a hearing in the absence of a finding of one of the § 2254(d) factors. Alternatively, it argues that Petitioner is not entitled to an evidentiary hearing due to his failure to show either cause and prejudice for the failure to develop the facts in the state proceedings or that a fundamental miscarriage of justice would result from the district court's failure to hold an evidentiary hearing. Petitioner responds by attempting to distinguish *Mitchell* and by arguing that a district court has inherent authority to order an evidentiary hearing to settle claims of ineffective assistance of counsel.

As the above-quoted portion of *Mitchell* shows, this court has held that a district court does not have the authority to order an evidentiary hearing when it fails to properly dispense

with the presumption of correctness. Additionally, this court succinctly discussed the cause and prejudice requirements that the State argues are relevant to this appeal:

> Because § 2254(d) is an express limitation on the district court's jurisdiction, a district court is without authority to hold an evidentiary hearing on a matter on which the state court has made findings unless one of the factors contained in § 2254(d) applies. It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"
>
> Once a district court has properly determined that it may dispense with the presumption of correctness mandated by § 2254(d), the court has some discretion in determining whether to hold an evidentiary hearing. However, an [sic] habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Therefore, a district court abuses its discretion by ordering such a hearing without first requiring the petitioner to make the requisite showing.

Mitchell, 114 F.3d at 577 (citations omitted). Thus, strictly on the basis of *Mitchell*, because the district court did not find

that one of the factors contained in § 2254(d) applies, the court lacked the authority to order an evidentiary hearing.[3]

Petitioner argues that *Mitchell* is inconsistent with both Supreme Court authority and other authority emanating from this Circuit which recognizes that district courts always have the inherent authority to order evidentiary hearings to settle disputed issues of material fact. Petitioner cites and quotes to *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), for the proposition that "the power of inquiry on federal habeas review is plenary." *Id.* at 312. Although *Townsend* was partially overruled as discussed below, the Court set out six situations in which a district court on habeas review must hold an evidentiary hearing. *Id.* at 313-14. Additionally, the Court stated that:

> [t]he purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

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[3] Petitioner attempts to distinguish *Mitchell* by arguing that the *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge involved therein was based solely upon factual state court findings, whereas the instant case involves an ineffectiveness of counsel claim that was clearly a mixed finding of fact and law. In turn, Petitioner argues that because the presumption of correctness does not apply in the instant case, *Mitchell* is not applicable and therefore not controlling. However, as the above-stated conclusion shows, the presumption of correctness does apply to the post-conviction trial court's findings of fact. Thus, Petitioner's attempt to distinguish *Mitchell* is erroneous.

Id. at 318. Thus, it seems that despite the holding in *Mitchell*, a district court does have the inherent authority to order an evidentiary hearing even if the factors requiring an evidentiary hearing are absent.

This issue was further discussed in *Keeney*, which partially overruled *Townsend* by holding that the cause and prejudice test applies to a habeas petitioner's failure to develop material facts at the state court level. *See Keeney*, 504 U.S. at 5. In so holding, the Court discussed in a footnote the relation between the instances listed in *Townsend* in which a district court must hold an evidentiary hearing and the exceptions to the presumption of correctness listed in § 2254(d):

> First, it is evident that § 2254(d) does not codify *Townsend's* specifications of when a hearing is required. *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

Id. at 10 n.5. Thus, this passage indicates the continuing viability of *Townsend's* statement that a district court may order an evidentiary hearing to settle disputed issues of material fact even following the adoption of the exceptions to the presumption of correctness listed in § 2254(d).

Thus, *Mitchell's* statement that a district court is without authority to order an evidentiary hearing in the absence of one of the exceptions listed in § 2254(d) is overbroad in that it fails to recognize the inherent authority that a district court always has in habeas cases to order evidentiary hearings to

settle disputed issues of material fact. This court has previously recognized this principle. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) (quoting *Townsend* for the proposition that a district judge's power to receive evidence on a habeas petitioner's constitutional claim is only constrained by his sound discretion). Other Circuits have likewise recognized this inherent discretion. *See Seidel v. Merkle*, 146 F.3d 750, 754-55 (9th Cir. 1998); *Clemmons v. Delo*, 124 F.3d 944, 952 (8th Cir. 1997); *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993).

Of course, recognizing a district court's inherent discretion to order an evidentiary hearing is an issue that is separate and distinct from whether a habeas petitioner is *entitled* to an evidentiary hearing. As Petitioner correctly points out, *Keeney* and *Mitchell* stand for the proposition that a:

> habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."

Mitchell, 114 F.3d at 577 (quoting *Keeney*, 504 U.S. at 11-12). Because the district court properly ordered an evidentiary hearing pursuant to its inherent authority to do so, the issue of whether Petitioner is entitled to an evidentiary hearing is irrelevant and will not be addressed.

Following the oral arguments in this case, the Supreme Court decided *Williams v. Taylor*, 120 S.Ct. 1479 (2000), in which it interpreted the fault requirement of a provision of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). The specific provision that was at issue states that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the

applicant shows [the existence of two limited exceptions]." 28 U.S.C. § 2254(e)(2). While the use of the word "shall" in this provision may evidence the Congressional intent to remove a district court's inherent discretion to order an evidentiary hearing in the absence of either of the provided exceptions, this provision does not apply to the instant appeal because Petitioner filed his habeas petition on the day before the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997) (holding that AEDPA only applies to petitions filed after the date of its enactment). While there may not be any inherent discretion to order an evidentiary hearing following the enactment of AEDPA, we decline to specifically determine whether AEDPA has so altered the law. *Williams* does not, therefore, lead to the conclusion that the district court erred below.

Additionally, although *Williams* characterized the *Keeney* decision as "requir[ing] the prisoner to demonstrate cause and prejudice excusing the default before he could receive a hearing on his claim," *id.* at 1488, the use of the word "could" does not imply that if the district court ordered a hearing based upon its inherent discretion, it erred. Thus, the distinction between when a petitioner is entitled to a hearing, which was at issue in *Keeney*, versus whether a district court has the inherent discretion to order a hearing, is still intact following *Williams*.

3. Ineffective Assistance of Counsel

Recognizing that in a habeas case a district court has the inherent authority to order an evidentiary hearing to settle disputed issues of material fact obviously raises the issue of how any evidence received by the district court is to be considered if the court holds that the presumption of correctness under § 2254(d) applies. The post-conviction trial court concluded that Petitioner's trial counsel's performance was deficient during the sentencing phase due to the failure to investigate and obtain information about Petitioner's background and mental health. However, it went on to hold

that Petitioner suffered no prejudice at the sentencing stage because the evidence that he would have offered to support a finding of mitigating circumstances was both helpful and harmful and that it would not have been a prudent strategy to present the evidence. The Tennessee Court of Criminal Appeals affirmed that decision. *See Jones*, 1995 WL 75427, at *2. The State argues that in the absence of the evidence presented at the evidentiary hearing below, the state court findings of fact show deficient performance on the part of Petitioner's trial counsel, but do not show any prejudice from that deficient performance. Petitioner responds by arguing that the state court findings of fact do show that he was prejudiced by trial counsel's deficient performance.

Strickland set forth the test for determining when the ineffective assistance of counsel so prejudices a defendant that his sentence must be set aside. First, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance of counsel under the Constitution." *Strickland*, 466 U.S. at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally,

> [w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. Finally, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless.

And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Of course, as stated above, the prejudice prong of the *Strickland* test is a mixed question of law and fact that is reviewed de novo.[4] Nevertheless, the state court findings of fact should be accorded the presumption of correctness under § 2254(d). The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the factual findings set forth above in the process. Based upon these findings of fact, the post-conviction trial court found that Petitioner did not suffer any prejudice from the deficient performance, a holding that the Tennessee Court of Criminal Appeals affirmed:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial. As the Supreme Court of the United States noted in *Strickland v. Washington*, 466 U.S. 668, 700 (1984), "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." Indeed proof of the appellant's

[4] Neither party argues that any error has ever been committed with respect to the performance prong of the *Strickland* test.

> psychological history in all probability would not have changed the result, especially in light of appellant's conviction of prior malicious killing while in a federal penitentiary and the other aggravating factors. A decision of counsel relating to a choice of trial or appellate strategy, even if it were proven improvident, could not form the basis for an ineffective assistance of counsel claim.

Jones, 1995 WL 75427, at *2.

Petitioner argues that this conclusion was in error, citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), for the proposition that the capital sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death." *Id.* Petitioner's reliance upon *Lockett* is misplaced as it involved the presentation of evidence of mitigating circumstances that was deemed not to fit within Ohio's narrow death penalty statute. *See id.* at 594-95. In the instance case, Petitioner did not "proffer" any evidence that the jury was precluded from considering.

Petitioner also relies upon *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995), for the proposition that "[o]ur sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity." *Id.*

Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. We reach this conclusion even considering the evidence presented at the evidentiary hearing below. When a district court in a habeas case orders an evidentiary hearing to settle disputed issues of material fact pursuant to its inherent authority to do so, that evidence could be offered for a variety of purposes, though the most common presumably would be to rebut the presumption of correctness

accorded to state court findings of fact. *See Groseclose v. Bell*, 130 F.3d 1161, 1163-64 (6th Cir. 1997) (stating that "federal courts must defer to state court factual findings, according a presumption of correctness that the petitioner may rebut only with clear and convincing evidence."). However, in the instant case, the additional evidence and factual findings made by the district court do not contradict the factual findings made by the post-conviction trial court. *Compare Abdur'Rahman*, 999 F.Supp. at 1093, *with id.* at 1094-1102. Instead, the additional evidence seems to merely supplement the factual findings made by the post-conviction trial court. *See Pollinzi v. Estelle*, 628 F.2d 417, 418 (5th Cir. 1980) (allowing evidence obtained at an evidentiary hearing to supplement the trial transcript and record).

Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Criminal Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. Thus, the decision of the district court that Petitioner was prejudiced at the sentencing stage due to his counsel's deficient performance is reversed.

4. Heinous, Atrocious, or Cruel Instruction

On cross-appeal, Petitioner argues that the "heinous, atrocious, or cruel" aggravating circumstance instruction that was given to the sentencing jury was unconstitutionally vague and overbroad, relying upon *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), and *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995). The district court concluded that even if the instruction was vague, any error caused thereby was cured by the Tennessee Supreme Court's application of a constitutional narrowing construction to the aggravating circumstance. The State argues that if the instruction was unconstitutionally vague, any error was harmless due to the jury's finding of other aggravating circumstances.

In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Court addressed the vagueness of a similar instruction and set forth the following standard to employ:

> Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
>
> *Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. Since *Furman*, our cases have insisted that the channeling

and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Id. at 361-62 (citations partially omitted).

The death penalty instruction in the instant case stated:

> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * * * * *
>
> (2) the murder was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind;
>
> * * * * * *
>
> In determining whether or not the State has proved aggravating circumstance number two above, you are governed by the following definitions. You are instructed that the word heinous means grossly wicked, or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful--causing suffering--excuse me--painful. Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Depravity means moral corruption, wicked, or preverse (sic) act.

Abdur'Rahman, 990 F.Supp. at 987.

In *Maynard*, the Court held that an instruction including as an aggravating factor that the murder was "especially heinous, atrocious, or cruel" was unconstitutionally vague, though the Court left open the possibility that certain limiting constructions of that instruction would be constitutionally acceptable. *Id.* at 364-65. Additionally, it noted that "some kind of torture or serious physical abuse" limiting instruction

may pass constitutional muster. *See id.* Following *Maynard*, this court held unconstitutionally vague an instruction stating a specified statutory aggravating circumstance as: "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Houston*, 50 F.3d at 387.

We decline to pass on the constitutionality of the instruction in this case because any error therein was harmless. "[W]henever an aggravating factor has been invalidated in a weighing state,[5] the sentence must be reweighed or analyzed for harmless error if the sentence is to be affirmed." *Coe*, 161 F.3d at 334. The *Coe* court went on to state that:

> In a weighing state . . . when a court invalidates one of the aggravators, it has removed a mass from one side of the scale. There is no way to know if the jury's analysis--how the aggravating and mitigating circumstances balanced--would have reached the same result even without the invalid factor.
>
> . . .
>
> [I]t is only when the "death sentence has been infected by a constitutionally . . . invalid aggravating factor" that state reweighing is required to preserve the verdict. By definition, though, an error that is harmless does not "infect" the sentence and does not require reweighing by the state.
>
> . . .
>
> We turn, therefore, to analyze this error for harmfulness. The question we must ask is whether the

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[5] "Tennessee is a 'weighing' state--that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death must be imposed." *Houston v. Dutton*, 50 F.3d 381, 387 (6th Cir. 1995).

> error "had substantial and injurious effect or influence in determining the jury's verdict."

Id. at 334-35. In *Coe*, the error was deemed harmless because the jury made the narrow finding that "the murder was especially heinous, atrocious, or cruel and involved torture," when it had been charged to find that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Id.* at 335.

Unfortunately, the jury's verdict form in the instant case was not preserved. However, the Supreme Court of Tennessee made the factual finding that the jury had found the three aggravating circumstances as set forth above in the Background section. *See State v. Jones*, 789 S.W.2d 545, 550 (Tenn. 1990). These factual findings are accorded the presumption of correctness under 28 U.S.C. § 2254(d). *See Sumner*, 449 U.S. at 546 (stating that § 2254(d) "makes no distinction between the factual determinations of a state trial court and those of a state appellate court."). Additionally, Petitioner has neither offered any argument as to why this presumption should not apply, nor any evidence that the jury did not find the three aggravating circumstances.

As the State correctly points out, there was ample evidence to support the aggravating circumstances that Petitioner had been previously convicted of one or more felonies involving the use or threat of violence to the person and that the instant murder was committed while the Petitioner was engaged in committing, or attempting to commit, any first degree murder or robbery. *See State v. Jones*, 789 S.W.2d at 550 (stating that "[t]here is no doubt that the evidence in this case was sufficient to support each of the aggravating circumstances found by the jury."). As quoted above, the *Coe* court found that removing one aggravating circumstance from the sentencing calculus in a weighing state normally would require a re-weighing of the aggravating and mitigating factors. *See Coe*, 161 F.3d at 334. However, in the instant case, as the district court found,

"[t]his is a case of no mitigating evidence--none--being offered to the jury despite its availability and abundance." *Abdur'Rahman*, 999 F.Supp. at 1101. Thus, even if the heinous, atrocious, or cruel aggravator is removed form the calculus, there is no mitigating evidence to weigh against the remaining prior felony conviction and felony murder aggravators. Therefore the error was harmless in that it did not have a substantial and injurious effect or influence in determining the jury's verdict.[6]

5. Petitioner's Unanimity Objection to the Sentencing Instructions

Petitioner argues that the sentencing instructions improperly led the jurors to believe that they had to unanimously find any mitigating circumstances and did not specifically instruct them otherwise. Although no direct instruction was given requiring that the jurors find the existence of each mitigating factor unanimously, Petitioner argues that the jury was repeatedly informed that their decisions had to be unanimous, but were not instructed that they did not have to be unanimous as to mitigating circumstances. The district court held that "there is not a reasonable likelihood that the jury interpreted the instructions to require unanimity as to mitigating circumstances. . . . [t]his Court is not persuaded that silence as to finding a mitigating circumstance would likely lead the jury to believe that unanimity was required in this case." *Abdur'Rahman*, 990 F.Supp. at 994. This holding was correct.

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Court held that sentencing instructions that create a substantial

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[6] This conclusion is not affected by our holding that the district court properly considered the evidence it obtained during the evidentiary hearing because although that evidence contained mitigating circumstances that could have been offered at the sentencing stage, Petitioner does not argue that a re-weighing is necessary on this basis. Thus, in terms of possible re-weighing, we look only to the evidence presented at the sentencing stage.

likelihood that reasonable jurors might think that they are precluded from considering any mitigating evidence in the absence of unanimity are constitutionally invalid. *See id.* at 384. The standard for reviewing such a challenge to the jury instructions "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

In the instant case, the substantive portions of the trial court's instructions were:

> Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.
>
> * * * * * *
>
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * * * * *
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated any mitigating circumstances which shall include, but not be limited to the following:
>
> * * * * * *
>
> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death. If the death penalty is the decision of the jury the members of the jury shall then complete the attached form entitled, quote:

> Punishment of Death
>
> End quote.
>
> The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.
>
> If the jury unanimously determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

Abdur'Rahman, 990 F.Supp. at 993. Additionally, at the end of the instructions the trial court stated that "[t]he verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous." *Id.* at 993-94.

Coe is dispositive of this issue. In *Coe*, the jury was similarly told that to impose the death sentence its verdict must be unanimous. *See Coe*, 161 F.3d at 337. This court held:

> We find that the instructions challenged by Coe do not violate Mills. Their language requires unanimity as to the results of the weighing, but this is a far different matter than requiring unanimity as to the presence of a mitigating factor. Nothing in this language could reasonably be taken to require unanimity as to the

> presence of a mitigating factor. The instructions say clearly and correctly that in order to obtain a unanimous verdict, each juror must conclude that the mitigators do not outweigh the aggravators.

Coe, 161 F.3d at 338. The same can be said of the instructions in the instant case. No statement therein can be said to require unanimity as to the presence of a mitigating factor. Indeed, Petitioner merely argues that the proximity of the terms "unanimous" and "mitigating circumstances" could have led the jury to misinterpret their obligation. This is not enough to create a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence.[7]

B. Petitioner's Cross-Appeal Challenging the Denial of his Petition for the Writ of Habeas Corpus as to his Conviction

On cross-appeal, Petitioner argues that the district court's conclusion that he suffered no prejudice from his trial counsel's deficient performance at the guilt stage was erroneous. First, Petitioner argues that due to his trial counsel's conflict of interest and wholly inadequate representation,[8] prejudice can be presumed and therefore need not be shown. Second, Petitioner argues that he did in fact suffer prejudice by trial counsel's delay in preparing for his trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history. In response, the State argues that there was no actual

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[7] Additionally, as the district court found, there was no mitigating evidence presented that the jury would have been precluded from properly considering even if the instructions were misinterpreted to require unanimity as to the existence of a mitigating factor.

[8] Petitioner argues that he is entitled to habeas relief on his conviction due to his trial counsel's inadequate performance without having to show prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), and *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). However, Petitioner points to no facts supporting a claim of wholly inadequate representation.

conflict of interest and that Petitioner suffered no prejudice because he cannot show a reasonable probability that the result of the proceeding would have been different in the absence of trial counsel's deficient performance.

The prejudice prong of *Strickland* relating to ineffectiveness of counsel at the guilt phase asks "the question . . . whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. As stated above, the prejudice prong of *Strickland* is a mixed question of law and fact subject to de novo review. *See Id.* at 698. Petitioner's claims must be evaluated keeping in mind the compelling incriminating testimony of both Miller and Norman. Additionally, Petitioner confessed to the crime at the sentencing stage. *See Abdur'Rahman*, 990 F.Supp at 1086.

1. Conflict of Interest

Petitioner argues that he need not show any prejudice as defined by *Strickland* because under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain [habeas] relief." *Id.* at 349-50. Petitioner argues that the third-party fee arrangement created a conflict of interest for his trial counsel because Boyd, the source of payment, was involved in the crime due to having allegedly supplied the shotgun used by Petitioner. However, the next sentence in *Cuyler* is dispositive of Petitioner's claim. *Cuyler* strictly requires that "until a defendant shows that his counsel actively represented conflicting interests, he has not established a claim of ineffective assistance. . . . [T]he possibility of conflict is insufficient to impugn a conviction." *Id.* at 350.

Petitioner fails to show that his trial counsel was actively representing conflicting interests. At most, Petitioner's trial counsel delayed the preparation of his case for too long in anticipation of receiving the balance of his retainer fee.

Though Petitioner argues that he was adversely affected by the conflict of interest, he does not allege that his trial counsel was actively representing conflicting interests. Additionally, Petitioner could not make such a showing because as the district court noted, "even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing." *Abdur'Rahman*, 999 F.Supp. at 1091. The district court noted that Barrett elicited testimony about the SEGM from Beard on cross-examination, mentioned the Petitioner's connection with the group during his closing argument, and issued subpoenas for Boyd and Beard to appear at the trial. Thus, it cannot be said that Barrett was actively representing conflicting interests.

Petitioner's reliance upon *Wood v. Georgia*, 450 U.S. 261 (1981), is misplaced. *Wood* involved an Equal Protection challenge to the imprisonment of three probationers because of their inability to make installment payments on fines. The Court did not resolve this issue because it remanded for a determination of whether a conflict of interest existed within a third-party payor arrangement. The probationers were three employees of an adult movie theater and bookstore who had been convicted of distributing obscene materials. As pointed out by Petitioner, the Court noted that "'[a] conflict of interest inheres in every such situation [a criminal defendant being represented by a lawyer hired and paid by a third party] . . . It is inherently wrong to represent both the employer and the employee . . . it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony." *Id.* at 271 n.15.

Unlike the instant case, in *Wood* the attorney was representing both the employer and the employees: "[s]ince it was this decision [not to pay the fines] by the employer that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer and has been paid by the employer, the risk of conflict of interest in this

situation is evident." *Id.* at 267. Additionally, the statement from *Wood* upon which Petitioner so heavily relies was contained in a footnote to that opinion and was not the basis of the Court's decision to remand for an evidentiary hearing to determine whether a conflict of interest existed. Instead, the Court stated that "[o]n the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him." *Id.* at 272. In the instant appeal, the record below does not compel the same conclusion. Given the district court's conclusion that Barrett did not protect the interests of Boyd or the SEGM, Petitioner cannot show that Barrett was actively representing conflicting interests and that he is therefore not entitled to a presumption of prejudice at the guilt stage.

2. Prejudice

Petitioner argues that the district court erred in concluding that he did not suffer any prejudice by his trial counsel's deficient performance of delaying his preparation for trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history.

First, Petitioner argues that Barrett's decision not to work on the case until he received the balance of the retainer prejudiced him by the lack of any meaningful work being performed and by depriving him of representation during his psychological evaluation. However, Petitioner points to no specific evidence that would raise a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt in the absence of this delay.

Second, Petitioner argues that he was prejudiced by his trial counsel's failure to investigate and present a lab report showing that no blood was found on the clothes he was allegedly wearing during the offense. The district court correctly held that such evidence would not have created a reasonable doubt about guilt because although there was testimony that Petitioner was wearing a long dark coat on the

night of the offense, there was no evidence that at the time of the homicide Petitioner was wearing the clothes seized later from his apartment. *See Abdur'Rahman*, 999 F.Supp. at 1096.

Finally, Petitioner argues that trial counsel's failure to investigate his mental history, especially his diagnoses of Post-Traumatic Stress Disorder and Borderline Personality Disorder, prejudiced him at the guilt stage of his trial. The district court held that this was not prejudicial because there was no evidence that Petitioner could have produced an expert to testify that he was insane at the time of the stabbings, or even if one did so testify that testimony would have been effectively countered by evidence from the Middle Tennessee Mental Health Institute from an examination authorized prior to trial that there was no basis for Petitioner to invoke an insanity defense. A review of this MTMHI document shows that it would be compelling evidence against any insanity defense. Thus, Petitioner cannot show that there is a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt if his trial counsel had investigated and presented evidence of his mental history.

The district court did not err in concluding that Petitioner suffered no prejudice at the guilt stage due to his counsel's deficient performance.

III. CONCLUSION

The district court's finding of prejudice at the sentencing stage is REVERSED and the judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence is VACATED. The district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED.

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge, concurring. The habeas court in this case believed that it had essentially unlimited discretion to conduct an evidentiary hearing on the petitioner's ineffective assistance of counsel claim. Such discretion is, however, an artifact of a bygone era. As this court recognized in *Mitchell v. Rees*, the modern Supreme Court has substantially pared back the ability of federal courts to retry cases already tried in the state courts. I would therefore hold that the district court in this case improvidently granted the petitioner an evidentiary hearing. I concur in all other parts of Judge Siler's opinion.

I

In 1963, the Supreme Court invested federal habeas courts with broad discretion in most aspects of collateral review of state criminal judgments. Contending that the common law conceived of the Great Writ as a remedy available for any kind of governmental detention contrary to fundamental law, the Court in *Fay v. Noia* declared that "federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in . . . state court proceedings." *Fay*, 372 U.S. 391, 426 (1963). This broad conception led the Court to hold that even a petitioner who had procedurally defaulted his claims in state court could obtain habeas relief, subject to the district court's "discretion" to deny relief when the orderly procedure of the state courts had been deliberately bypassed. *Id.* at 434, 438. In parallel fashion, the Court empowered federal habeas courts to conduct evidentiary hearings even when a petitioner had failed to develop the facts in state court proceedings. "In every case," the Supreme Court wrote in *Townsend v. Sain*, the district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." *Townsend*, 372 U.S. 293, 318 (1963). *Townsend* limited the discretion of habeas courts in this regard only by requiring that evidentiary

hearings be held under six circumstances that would call into question the integrity of state court factfinding. *Id.* at 313.

The generation following *Fay* and *Townsend* has witnessed a sea-change in the law of habeas corpus. This change has been spurred by an increased attentiveness to considerations of comity and the values of "our federal system." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The idealistic predictions of *Fay* and *Townsend* that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, would not employ their discretion to subvert the integrity of state criminal justice, had been proven wrong. *Townsend*, 372 U.S. at 318; *see also Fay*, 372 U.S. at 433 (suggesting that the plenary power of inquiry on federal habeas corpus would not create incentives for defendants to withhold claims in state proceedings). The law reviews and the popular press echoed with calls for the unelected federal judiciary to desist from frustrating the outcomes of democratic process, particularly in capital cases. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U.L. Rev 333 (1998) (tracing the history of the countermajoritarian difficulty); *see also* Thomas Goldsmith, *Activists Want Nixon Impeached: Group Takes Message to Centennial Park*, The Tennessean, Mar. 26, 2000, at 1B (noting current calls for the impeachment of a federal district court judge on the ground that his personal bias against the death penalty makes him unfit to hear cases in which it is a factor). *Fay* was overruled. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

Recognizing that in a federal system, the States should have the first opportunity to address and correct violations of state prisoners' federal rights, and that *Fay* had undervalued the important interests served by state procedural rules, the Supreme Court replaced *Fay*'s "deliberate bypass" standard with a cause-and-prejudice inquiry. *Coleman*, 501 U.S. at 731, 750. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent

and adequate state procedural rule, federal habeas review of the claims is *barred* unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750 (emphasis supplied). In view of the significant harm suffered by States when federal courts failed to respect state procedural rules, federal court "discretion" to consider a habeas petitioner's federal claims was inappropriate when the petitioner had deprived the state courts of an opportunity to address those claims in the first instance.

Townsend's holding with respect to evidentiary hearings, too, was overruled. Just as a district court had no discretion to consider federal claims that a habeas petitioner had not submitted to the state courts, neither could it have discretion to allow a petitioner to develop facts that had not been fairly presented to the state courts. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992) (stating that it is "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim"). Thus, in *Keeney v. Tamayo-Reyes*, the Supreme Court applied the cause-and-prejudice standard to determine whether a state prisoner who had failed to develop material facts in state court was entitled to an evidentiary hearing on habeas corpus. *Id.* at 11.

Keeney was a case in which a petitioner sought a federal evidentiary hearing but did not receive one. *See Id.* at 4. Taking his cue from this fact, Judge Siler interprets *Keeney* to mean that a showing of cause and prejudice *requires* a habeas court to conduct an evidentiary hearing, but that even in the absence of such a showing, the court retains discretion to hold a hearing. *See ante* at __. In my view, neither the language nor the reasoning of *Keeney* will support this interpretation. In addition, the Supreme Court's recent pronouncements in *Williams v. Taylor*, 120 S. Ct. 1479 (2000), strongly

corroborate a reading of *Keeney* that limits the authority of habeas courts to order evidentiary hearings.

The *Keeney* Court granted certiorari to decide "the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings." *Keeney*, 504 U.S. at 5. Ultimately, the Court determined that "the 'cause-and-prejudice' standard embodies the correct accommodation between the competing concerns implicated in a federal court's habeas power." *Id.* at 7. As a purely textual matter, nothing in the Court's framing of the question, or in its resolution of that question, suggests that the Court was restricting its holding to those circumstances in which a habeas petitioner is "entitled" to an evidentiary hearing.

More importantly, the logic that the Court followed to arrive at the cause-and-prejudice standard will not admit of such a construction. The Court based its holding on a quintet of values embedded in our federal system: comity, finality, judicial economy, channeling of claims to the appropriate forum, and uniformity in the law of habeas corpus. *Id.* at 8-10. It is difficult to understand how any of these values would be served by a system that entitled state prisoners to evidentiary hearings only upon a showing of cause and prejudice, but nevertheless invested the habeas courts with bottomless discretion to order hearings where they are not required. Such a system still would deny the States the opportunity to correct their own constitutional errors, would multiply the opportunities to relitigate convictions, and would consume scarce judicial resources.

Of particular concern is the disruption to the values of proper forum allocation and uniformity that would attend survival of the *Townsend* doctrine. The Supreme Court likened the former value to the requirement of exhaustion, noting: "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Id.* at 10. A doctrine that allows a

habeas court to conduct an evidentiary hearing where the petitioner has, without cause, failed to develop facts in state court re-engineers this two-way street into a blind alley. Even though the state court is the appropriate forum for resolution of factual questions in the first instance, *Townsend* creates "incentives for the deferral of factfinding to later federal court proceedings"--which can only "degrade the accuracy and efficiency of judicial proceedings." *Id.* at 9.

Similarly, the *Keeney* Court rested its holding on a symmetry between the jurisprudence of procedural default and that governing factfinding in the habeas courts. "There is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated," wrote the Court. "And little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum." *Id.* at 10. A dogged fidelity to *Townsend* disrupts this symmetry. Absent a showing of cause and prejudice, a habeas court would have no discretion to entertain a claim that had been procedurally defaulted in state court, but would have discretion to conduct an evidentiary hearing on a claim raised but insufficiently developed in state court, even where the petitioner did not show cause and prejudice for his failure to develop the factual record in the state court. Given the importance that the *Keeney* Court ascribed to uniformity in the law of habeas corpus, that cannot be a correct reading of the case.

This Court has recognized that *Keeney* implicitly withdrew the discretion that *Townsend* had granted. In *Mitchell v. Rees*,[1] we reversed a district court for ordering an

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[1]To the extent that *Mitchell* suggested that a district court is without authority to hold an evidentiary hearing without first finding that one of the factors listed in 28 U.S.C. § 2254(d) applies, I agree with Judge Siler that its statement is "overbroad". *See Keeney*, 504 U.S. at 1720 n.5 (noting that § 2254(d) "indicates no assumption that the presence or

evidentiary hearing on a habeas petitioner's *Batson* challenge without requiring the petitioner to establish either (1) cause and prejudice for his failure to adequately develop the material facts in the state court proceedings, or (2) that not holding an evidentiary hearing would result in a fundamental miscarriage of justice. *Mitchell*, 114 F.3d 571, 579 (6th Cir. 1997). "[A] district court abuses its discretion," we said, "by ordering such a hearing without first requiring the petitioner to make the requisite showing." *Id.* at 577. We have been joined in this understanding by at least one other Circuit. *See Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992).

Our understanding is buttressed by a case decided by the Supreme Court just this Term, *Williams v. Taylor*. In *Williams*, the Court interpreted 28 U.S.C. § 2254(e)(2), a statute enacted four years after the decision in *Keeney*. Section 2254(e)(2) provides: "If the [habeas] applicant has failed to develop the factual basis of a claim in State court proceedings, the court *shall not* hold an evidentiary hearing on the claim unless the applicant" satisfies certain conditions. 28 U.S.C. § 2254(e)(2) (emphasis supplied). In deciding the level of fault connoted by the term "fail", the Court determined that the opening clause of § 2254(e)(2) is essentially a codification of the holding in *Keeney*: "Congress intended to preserve at least one aspect of *Keeney*'s holding: prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams*, 120 S. Ct. at 1489. As this language suggests, the Supreme Court itself does not read *Keeney* as deciding when a petitioner is *entitled* to an evidentiary hearing; rather, the case sets forth what a petitioner must do in order to obtain one. *See also Id.* at 1488 ("We required the prisoner [in *Keeney*] to demonstrate cause and prejudice excusing the default before he *could* receive a hearing on his claim . . . ." (emphasis supplied)).

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absence of any of the statutory exception will determine whether a hearing is held").

Keeney, *Mitchell*, and *Williams* thus command that a petitioner who has not developed facts in state court must justify his failure to do so through a showing of cause and prejudice before he may present those facts to a federal habeas court.

II

In Tennessee's post-conviction courts, petitioner Abdur'Rahman claimed that his trial counsel had rendered ineffective assistance by failing to investigate his mental health and criminal histories sufficiently to paint a sympathetic picture of his abusive childhood and resulting serious mental illness at sentencing. The state court conducted an evidentiary hearing, at which it considered the testimony of one Dr. Barry Nurcombe; Abdur'Rahman's school, military, and prison records; the transcript of a previous trial; records of the Middle Tennessee Mental Health Institute; records of social services departments; the affidavit of Mark Jones, Abdur'Rahman's brother; and a great deal of other evidence. At the conclusion of the hearing, the court held that Abdur'Rahman's trial counsel had been constitutionally deficient--reasonable attorneys would have investigated the accused's mental health and criminal histories. The court concluded, however, that counsel's faulty performance did not prejudice Abdur'Rahman. The evidence introduced at the hearing, the court noted, contained extensive documentation that Abdur'Rahman had had a past of profound violence, but no serious mental illness. Deciding that this information "looks like a mine field for any trial attorney to tiptoe through," the court denied post-conviction relief.

In his petition for federal habeas relief, Abdur'Rahman renewed his contention that trial counsels' deficient performance at sentencing had resulted in prejudice. Over the State's objection, the district court conducted an evidentiary hearing on the ineffective assistance claim. Although the State confronted the district court with *Mitchell*, the court

cited an unpublished district court order for the proposition that the granting of an evidentiary hearing is discretionary. The district court proceeded to consider a significant volume of evidence, including the testimony of seven live witnesses, that was not presented to the state courts. Largely on the basis of this evidence, the district court concluded that Abdur'Rahman had been prejudiced because his trial attorneys could have shown such mitigating circumstances as childhood abuse, serious mental illness, and the defendant's good qualities.

In doing so, the district court erred. Upon authority of *Keeney* and *Mitchell*, the district court could not order an evidentiary hearing until Abdur'Rahman showed cause for his failure to develop the factual record fully in the state courts. Ordinarily we would vacate the order partially granting the writ of habeas corpus and the order for the evidentiary hearing, *Mitchell*, 114 F.3d at 579, and remand the matter to the district court to afford Abdur'Rahman the opportunity to bring forward evidence establishing cause and prejudice, *Kenney v. Tamayo-Reyes*, 504 U.S. at 11. In this case, however, such a disposition is unnecessary; the evidence that Abdur'Rahman adduced at the federal evidentiary hearing is plainly insufficient to undermine confidence in the jury's sentence. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). As Judge Siler points out, the additional evidence presented to the habeas court merely supplemented the factual findings made by the post-conviction trial court. What the state court said in 1995 holds true today: "It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the face of a prior murder conviction which is added to two additional aggravating circumstances including the heinousness of the killing." I therefore concur that the order granting the writ as to Abdur'Rahman's death sentence should be reversed.

CONCURRING IN PART, DISSENTING IN PART

R. GUY COLE, JR., Circuit Judge, concurring in part, dissenting in part. Because I would affirm the district court's determination that Abdur'Rahman's counsel was constitutionally ineffective at sentencing and that the writ should be granted as to this issue, I respectfully dissent from that portion of Judge Siler's opinion.

As an initial matter, I agree with Judge Siler that the district court properly ordered an evidentiary hearing, under its discretion to do so, and properly considered the evidence presented at this hearing. I also note that the concurrence's invocation of the bugaboo of overreaching federal courts does not reflect the reality of federal habeas review. *See* 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 482 (1990) (reporting that, in 1987 and 1988, only 1.1% of habeas corpus petitioners received a full hearing at the district court).

Abdur'Rahman's counsel was constitutionally ineffective at sentencing due to counsel's utter failure to investigate or present available mitigating evidence. In order to prove ineffective assistance of counsel, Abdur'Rahman must fulfill the familiar two-prong requirement of *Strickland v. Washington*, 466 U.S. 668 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. As noted by the majority, we review this mixed question of law and fact de novo. *See Id.* at 698; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996).

The district court and both Tennessee post-conviction courts that examined this case determined that Abdur'Rahman's counsel's performance was deficient. The state does not challenge this determination. I survey counsel's deficiencies here because I believe that they help illuminate why Abdur'Rahman's sentence of death "resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Counsel's performance, as it related to preparation for and presentation at the sentencing hearing, was constitutionally inadequate. "[W]hen a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation." *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999); *see Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995) (stating that defense counsel was obligated to investigate mitigating mental health evidence for sentencing). Counsel failed to ask the trial court to declare Abdur'Rahman[1] indigent or to ask the court for funds for investigation or experts; failed to hire an independent mental health expert; failed to investigate the nature of Abdur'Rahman's prior convictions; failed to contact and present available witness testimony from Abdur'Rahman's family at sentencing; failed to investigate Abdur'Rahman's numerous mental health records or educational, military, and prison records; and failed to inquire about Tennessee records regarding Abdur'Rahman's mental health or background or introduce evidence from these at his sentencing hearing. In sum, counsel completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence.

The majority suggests that, armed with this evidence, defense counsel could have made a legitimate tactical

[1]I use Abdur'Rahman's present name throughout when referring to him, even in the context of events that occurred or documents created when the petitioner went by the name of Jones.

decision not to present the evidence, which is now in the record but was not presented to the jury, and that we should defer to this decision. Unfortunately, defense counsel's "tactical decision" in this case was to not prepare for the capital sentencing hearing of their client. "[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

Further, and more importantly, I disagree with the majority's finding that Abdur'Rahman was not prejudiced by counsel's failure. To demonstrate prejudice, Abdur'Rahman "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. He need not show that counsel's performance more likely than not affected the outcome of the case. *See Id.* at 693-94. Instead, "[w]hen a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 696.

Counsel's failure to investigate or properly prepare for sentencing resulted in the presentation of essentially no mitigating evidence to the jury at the sentencing phase. Despite counsel's assertion in his opening statement that he would put on other witnesses, Abdur'Rahman and his wife were the sole witnesses at sentencing and their testimony related to the circumstances of the offense for which he was found guilty. It did not address Abdur'Rahman's history of abuse, his mental health treatment, or other relevant aspects of his life. This is so despite the fact that the jury should "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the

circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original)).

Although the jury found three aggravating factors at sentencing, it had nothing to weigh this information against; it is unsurprising that comparing those three factors with the dearth of mitigating evidence that the jury chose to impose a death sentence on Abdur'Rahman. However, "[t]he Eighth Amendment requires a jury to consider the circumstances of the crime and the defendant's background and character during the sentencing phase of a capital trial." *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). The jury's failure to consider mitigating evidence "risks erroneous imposition of the death sentence." *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) (quoting *Eddings v. Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring)).

Unbeknownst to the jury determining Abdur'Rahman's fate, mitigating evidence existed and was available for presentation at his sentencing hearing. If counsel had performed adequately, the jury could have learned that that Abdur' Rahman has a history of traumatic abuse as a child, that he had a long history of mental health problems and treatments, and, finally, that Abdur'Rahman had previously been a productive member of society.

The abuse suffered as a child by Abdur'Rahman, mostly at the hands of his father, a military policeman, was inhumane and shocking.[2] Dr. Raymond Winbush, who testified before

[2] As the district court stated:

> During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

the district court, stated that Abdur'Rahman's "is singularly the worst case of abuse I have come across in 25 years being an academic psychologist . . . I can't even in my memory remember anything that remotely comes close to some of the things I read."

This abuse was attested to by the petitioner, the petitioner's half-sister, who was not contacted by counsel but was available to testify, and the petitioner's brother, Mark Jones, who likewise was not contacted by counsel but stated in an affidavit that he would have been willing to testify at trial.[3] This abuse, while not a justification for petitioner's criminal conduct, is relevant, mitigating evidence that should have been presented to the jury.

Abdur'Rahman had a persistent history of psychiatric disorders and mental health problems. A "defendant[] who commit[s] criminal acts that are attributable to a disadvantaged background, or to emotional and mental

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. Petitioner's mother later married Petitioner's father, James Jones, Sr. Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.

Petitioner's statements to mental health providers [over the course of his life] provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury.

Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1097-98 (M.D. Tenn. 1998) (footnote and citations to record omitted).

[3] Petitioner's brother subsequently committed suicide.

problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). The mental health of the defendant has consistently been determined to be relevant, probative information to which the jury is entitled when making a life or death decision. *See, e.g., Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (finding that the petitioner was prejudiced by counsel's failure to investigate and present mitigating evidence at sentencing); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). The jury, however, heard nothing at sentencing regarding Abdur'Rahman's mental health history.

In the record before us, we have the testimony of Dr. Samuel Craddock, who was part of the team that diagnosed Abdur'Rahman for the state of Tennessee for purposes of competency to stand trial and a potential insanity defense without knowledge of his history of mental illness. Craddock testified that Thorazine and Prolixin, the medications prescribed for Abdur'Rahman in prison, were powerful anti-psychotic medications which raised a question of whether he was mentally ill, and that the symptoms exhibited by Abdur'Rahman were like those of someone with a borderline personality disorder. Dr. Diana McCoy testified that she diagnosed Abdur'Rahman with post-tramatic stress disorder and a possible borderline personality disorder. Dr. Robert Sadoff offered a similar diagnosis as McCoy.

Included in the records before this court are a department of social services report from the state of Washington stating that Abdur'Rahman had a "paranoid personality" and "personality pattern disorder;" Philadelphia school records which include a request for psychiatric services; and prison records, including psychiatric examinations, some which state that Abdur'Rahman does not have a mental illness or psychosis, but does have a history of documented suicide attempts, and some which indicate that Abdur'Rahman was diagnosed with other disorders, including a severe psychopathic personality and a "psychotic depressive reaction

and antisocial personality." Abdur'Rahman's prison records also indicate that Abdur'Rahman was frequently and heavily medicated during at least some of his time in prison and that he beat his head against the wall while in prison. Records from the New Jersey Department of Human Services document his 1967 stay while a youth at the Trenton Psychiatric Hospital, where he was diagnosed with a sociopathic personality disturbance and antisocial reaction with depression, and records from the Davidson County Sheriff's Department show that Abdur'Rahman beat his head against a wall after his arrest there. Further, the record indicates that others in Abdur'Rahman's family had mental health problems. Many of these records were available to defense counsel through the MTMHI report, prepared for the purpose of determining Abdur'Rahman's competence to stand trial;[4] however, counsel failed to investigate or present any of this mitigating information to the jury. Nor did counsel present to the jury a mental health expert who could have testified regarding Abdur'Rahman's mental health problems.

Further, testimony from the trial of Abdur'Rahman's conviction for second-degree murder for the killing of a fellow inmate - a conviction that supported one of the aggravating circumstances - indicated, in the opinion of one expert, that Abdur'Rahman had a borderline personality disorder and schizoid personality. This evidence could have been mitigating with respect to the petitioner's mental health, as well as with respect to the prior murder.

Abdur'Rahman's wife could have her personal observations about his mental health, including the fact that her husband had conversations with people who did not exist, banged his head against the wall, and believed that the couple would give birth to the next Messiah. She also stated that she

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[4]The fact that Abdur'Rahman was found competent to stand trial does not, of course, alter the fact that his mental health problems should be considered by the jury at sentencing. *See Blano v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

told defense counsel that a psychiatrist should examine her husband.

Despite his childhood abuse and extensive mental health history, Abdur'Rahman was able to comport his conduct to societal norms and to engage in productive activities. His former fiancé, about whom he informed defense counsel, but whom counsel failed to contact, later testified that, when she knew him in 1983, Abdur'Rahman held a steady job, attended college, and volunteered with a Quaker youth group at a large housing project. She stated that the petitioner was a caring and gentle person who sincerely held Christian beliefs.

While acknowledging that some of this evidence would have been mitigating, the majority adopts the rationale of the state court of appeals that the evidence that defense counsel failed to investigate or present also contained instances of violent conduct and anti-social actions by Abdur'Rahman. This treatment of the evidence by the majority contradicts the emphasis by the courts that evidence considered mitigating by the person facing a death sentence should be allowed to the greatest extent possible to insure a full and fair determination by the jury. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Further, the majority overlooks that the jury already had much of this evidence of violent or prior criminal conduct before it and that the presentation of available, relevant evidence at sentencing would not have subjected Abdur' Rahman to additional statutory aggravating factors. The mitigating elements of this evidence would have served, instead, to present the jury with an accurate and complete picture of the person they were sentencing - the very purpose of a capital sentencing hearing. In addition, the majority ignores the mitigating potential of nearly all of the available evidence and the fact that some of the evidence that counsel failed to investigate or present does not involve violence or harmful behavior by Abdur'Rahman. *See Williams v. Taylor*, 120 S. Ct. 1495, 1514 (2000) (noting that the presence of unfavorable records did not justify "the failure to introduce

the comparatively voluminous amount of evidence that did speak in [petitioner's] favor").

Had counsel adequately performed, the jury weighing whether a death sentence was an appropriate punishment for Abdur'Rahman would have had a representative picture of the person they were sentencing, instead of the one-sided account upon which they based their decision. Like the petitioner recently before the Supreme Court, Abdur'Rahman has "a constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams*, 120 S. Ct. at 1513. Given the total lack of mitigating evidence presented at Abdur'Rahman's sentencing hearing, "counsel's conduct so undermined the proper functioning of the adversarial process that the [sentencing hearing] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *see also Austin*, 126 F.3d at 848; *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1996). I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR' RAHMAN,
Petitioner-Appellant
vs.
RICKY BELL
Respondent-Appellee

Nos. 98-6568/98-6569
CAPITAL HABEAS CORPUS

APPELLEE ABU-ALI ABDUR'RAHMAN'S MOTION TO WITHHOLD THE MANDATE AND GRANT REHEARING *EN BANC* OR REMAND FOR FURTHER PROCEEDINGS

Earlier today, the Supreme Court of the United States denied the Petition for a Writ of Certiorari filed by Appellee Abu-Ali Abdur'Rahman ("Appellee") to review this Court's judgment in this case. Accordingly, Appellee respectfully moves this Court for an Order withholding its mandate and directing either that the case will be reheard *en banc* or that the case will be remanded to the district court for further proceedings. This Court's authority to issue such an Order in light of the highly unusual intervening circumstances present in this case is clear. *Compare First Gibraltar Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995) (granting rehearing, vacating judgment, and reaching different result after denial of certiorari based on intervening circumstances), *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989) (same), and *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977) (same) *with Nyyssonen v. Bendix Corp.*, 356 F.2d 193, 193 (1st Cir.), *cert. denied*, 385 U.S. 846 (1966)

(denying leave to file motion for rehearing after denial of certiorari when motion "contains nothing of substance that could not have been asserted in a timely motion in response to our original opinion").

Specifically, this Motion rests on five distinct intervening developments that have occurred since this Court last considered this case: (i) intervening decisions of this Court that create a conflict with the decision in this case that can only be resolved *en banc*; (ii) the State's express argument to the Supreme Court, in opposition to Appellee's Petition for a Writ of Certiorari, that the patent inconsistencies between the panel opinion in this case and other Sixth Circuit precedent "should be resolved *by the Sixth Circuit* and not by a grant of certiorari" (emphasis added); (iii) an intervening decision of the U.S. Supreme Court with which the panel opinion in this case conflicts; (iv) the State's concession that the panel opinion in this case was simply wrong in a critical respect; and (v) an important intervening procedural Order of the Tennessee Supreme Court. Particularly given that this Court's previous Order denying rehearing *en banc* strongly suggests that the Court was narrowly divided at that time, Appellee's counsel file this Motion based on a sincere, good faith belief that these five intervening developments, alone or in combination, will lead the full Court to reconsider the case.

The relevant events relating to the issuance of the mandate in this case are as follows. On September 13, 2000, a divided panel of this Court entered its opinion reinstating Appellee's death sentence. 226 F.3d 696 (reversing the district court's decision, which is published at 999 F. Supp. 1073). On January 9 and 11, 2001, the panel entered a stay of mandate pending the filing and disposition of a Petition for a Writ of Certiorari. Appellee subsequently filed his Petition. Today, the Supreme Court denied the Petition.[1]

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[1] The Supreme Court also denied a motion by the State to strike the discussion by an *amicus curiae* of affidavits sworn to by a majority of the trial jurors stating that they likely would *not* have voted to impose the

The Clerk of the Supreme Court will provide a certified copy of the Supreme Court's Order to this Court. *See* S. Ct. R. 45.3. Absent a further Order of this Court, this Court's current stay of mandate (which is in place pending the filing and disposition of Appellee's Petition for a Writ of Certiorari) will then expire. *See* Fed. R. App. P. 41(d)(2). This Court, however, has the broad power to issue a distinct stay pending Appellee's further request for rehearing *en banc* and to grant rehearing subsequent to the denial of certiorari. *See* Fed. R. App. P. 41(d)(1); *supra* at 1-2 (collecting cases). For the reasons described in the Argument section below, this case presents extraordinary circumstances that merit withholding the mandate and granting *en banc* consideration, or at least remanding to the district court for further consideration.

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V. *En Banc* Consideration Is Warranted Because, On The Majority's Rationale, Appellee Is Entitled To The Benefit Of An Intervening Tennessee Supreme Court Order.

Finally, rehearing also should be granted in light of an intervening Order of the Tennessee Supreme Court providing that issues not presented in a discretionary application to that Court following an adverse decision of the Tennessee Court of Criminal Appeals shall be deemed exhausted. *See* Tenn. S. Ct. R. 39.[9] Alternatively, this Court should modify its

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death penalty had the available mitigation evidence been presented to them.

[9] Tenn. S. Ct. R. 39 provides: "In all appeals from criminal convictions or post-conviction relief from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

judgment to permit the district court to consider the effect of this Order.

The recent promulgation of Tenn. S. Ct. R. 39 is highly relevant to this case. The district court held that Appellee had failed to exhaust and had therefore procedurally defaulted a number of claims by failing to present them to the Tennessee Supreme Court in an application for discretionary review. The district court thus refused to consider a number of Appellee's claims of prosecutorial misconduct which, in fact, were properly exhausted according to Rule 39.[10] Appellee did not challenge that determination in this Court, principally because he had prevailed in the district court, and also because substantial page limits constrained the number of points he could raise.

In light of the Tennessee Supreme Court's intervening enactment of Rule 39, it is clear that the district court's legal conclusion was erroneous. Because the comity interests underlying the district court's finding of procedural default are therefore not in fact present, it would be appropriate for this Court to resolve the claims that the district court refused to resolve.[11] At the least, the Court should remand to the

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[10] These claims of prosecutorial misconduct include: whether the prosecution should have disclosed the statements of certain witnesses, the redacted portions of certain police reports, a memorandum in the prosecution's file concerning a bank account in the victim's name, the statement of the victim's brother together with lab reports about the victim, and information about Petitioner's bank account; whether the prosecution unconstitutionally influenced the co-defendant's testimony which was given as part of a plea bargain; whether the prosecution provided false information to the state mental health evaluators; whether the prosecution improperly manipulated the testimony of a key witness (in addition to the co-defendant); and whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's prior murder conviction. *See* 999 F. Supp. at 1082, n.8.

[11] Appellee has not defaulted those claims in this Court. Appellee's argument only became apparent when the Tennessee Supreme Court issued its Order. In addition, for the reasons stated in the text, it was reasonable for Appellee (having prevailed in the district court) not to continue to pursue those claims in this Court. Finally, there can be no

district court to permit it to consider those claims in the first instance.[12]

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court issue an Order providing that this Court's mandate shall be withheld and the case shall be reheard *en banc* or the case will be remanded to the district court for further consideration.

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reasonable dispute that, if this Court is going to consider issues not raised in the appellate briefing, it must do so evenhandedly. Hence, the Court would be justified in raising the Tennessee Supreme Court's ruling *sua sponte*.

[12] Appellee is preparing to file with the district court a protective motion under Fed. R. Civ. P. 60(b) that is based on the Tennessee Supreme Court's rulle.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:96-0380

ABU-ALI ABDUR'RAHMAN
v.
RICKY BELL

PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED.R.CIV.P. 60(b)

Petitioner Abu-Ali Abdur'Rahman (formerly James Lee Jones) hereby moves the Court for relief from this Court's judgment entered April 8, 1998 (Docket Nos. 205, 206), in which this Court dismissed a number of Petitioner's prosecutorial misconduct claims on non-exhaustion and procedural default grounds. *See Abu-Ali Abdur'Rahman v. Ricky Bell*, 999 F.Supp. 1073, 1079-83 & n.8. Petitioner's prosecutorial misconduct claims that were dismissed by this Court should be reinstated and addressed by this Court on the merits because of the recent promulgation of Rule 39 of the Rules of the Supreme Court of the State of Tennessee. These prosecutorial misconduct claims should be addressed both independently and cumulatively with the ineffective assistance of counsel claims and the other errors in this case. The evidentiary record supporting these claims has already been established in this proceeding. This Motion is made under Rule 60(b)(6) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases. This Motion is also made under the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution.

In support of this Motion, Petitioner states as follows:

BACKGROUND

1. This capital habeas corpus proceeding was commenced by a *Pro Se* Petition filed on April 23, 1996 (Docket No. 1), seeking federal habeas relief under 28 U.S.C. § 2254.[1] Petitioner's claims for relief are set forth in Petitioner's Amended Petition for Writ of Habeas Corpus in a Capital Case filed with this Court on December 2, 1996 (Docket No. 37) (the "Amended Petition").

2. On May 28, 1996, this Court entered an Order staying Petitioner's execution until further order of the Court. (Docket No. 24). The stay of Petitioner's execution under this Order remains in effect.

3. The Amended Petition seeks relief from Petitioner's Tennessee first degree murder conviction (as well as his other Tennessee convictions) and his death sentence (as well as his other sentences). The grounds for relief include, but are not limited to, ineffective assistance of counsel and prosecutorial misconduct in violation of Petitioner's rights under the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution. Petitioner's prosecutorial misconduct claims are set out in Part D of the Amended Petition.

4. This Court conducted an evidentiary hearing in this case commencing in February, 1998. The record established in that hearing supports the claims for habeas relief the Petitioner is raising in this Motion.

5. On April 8, 1998, this Court entered a judgment in this case, which is reported at 999 F.Supp. 1073 (the "April 1998 Judgment") (Docket Nos. 205, 206). This Court granted Petitioner relief from his death sentence on grounds of

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[1] This case is governed by the provisions of Section 2254 that were in effect at the time of the filing of the Petition, before the effectiveness of the amendments provided in the Antiterrorism and Effective Death Penalty Act of 1996.

ineffective assistance of counsel. This Court denied Petitioner relief from his first degree murder conviction.

6. In the April 1998 Judgment, this Court addressed two of Petitioner's prosecutorial misconduct claims: (i) the *Brady* claim arising from the prosecution's failure to turn over the "1972 transcript" from Petitioner's prior murder case and (ii) the *Brady* claim arising from the prosecution's failure to turn over the T.B.I. report on the "blood evidence." *See* Amended Petition, ¶¶ D.1.(1) and D.1.(7). With respect to the "1972 transcript" prosecutorial misconduct claim, this Court found that the prosecution did violate its *Brady* obligation by failing to produce the transcript to the defense; but this Court concluded that, "standing alone," this violation was not material. 999 F.Supp. at 1089-90. With respect to the prosecutorial misconduct claim concerning the T.B.I "blood evidence" report, this Court determined that there was no *Brady* violation. *Id.* at 1090.

7. In a previous Order, this Court addressed Petitioner's "sentencing stage prosecutorial misconduct" claim relating to the prosecution's presentation of inadmissible information to Petitioner's sentencing jury in blatant violation of the trial court's prior ruling (issued just moments before the information was passed to the jury) that the information was inadmissible and after the prosecution assured the court that would not happen. *See* Amended Petition, ¶ D.6. In Petitioner's direct appeal, the Tennessee Supreme Court reprimanded the prosecution and said that this conduct "bordered on deception" and was "improper." *State v. Jones*, 789 S.W.2d 545, 551-2 (Tenn. 1990). This Court evaluated this error in isolation and found that it was harmless.

8. This Court dismissed Petitioner's remaining prosecutorial misconduct claims on the ground that those claims were not presented in Petitioner's motion to the Tennessee Supreme Court for permission to appeal from the lower state courts' denial of post-conviction relief. *See* 999 F.Supp. at 1081, n.8. Petitioner had presented the substantial body of his prosecutorial misconduct claims to the Tennessee

Court of Criminal Appeals, as more fully set forth below. Tennessee Supreme Court review of a post-conviction case is merely discretionary. Despite Petitioner's contention to this Court that federal exhaustion did not require that claims must be presented to the Tennessee Supreme Court on a request for discretionary appeal,[2] this Court held that these claims were not exhausted and were therefore procedurally defaulted. *Id.* at 1080.

9. Respondent appealed from this Court's Judgment granting Petitioner relief from his death sentence. Petitioner appealed from this Court's Judgment denying relief from his conviction.

10. In Respondent's appeal, in the face of the overwhelming and unrebutted mitigation evidence presented to this Court which demonstrated that Petitioner was prejudiced by ineffective assistance of counsel, Respondent never challenged and therefore abandoned any claim concerning this Court's finding of ineffective assistance of counsel at sentencing based upon this Court's evidentiary record. Respondent's only argument on appeal was that this Court should not have conducted an evidentiary hearing and instead should have relied entirely upon the state court's ruling on ineffective assistance of counsel. The issue of whether the evidentiary record in this Court supports this Court's finding of ineffective assistance of counsel at sentencing was never briefed by the parties nor discussed at the oral argument before the Sixth Circuit.

11. On September 13, 2000, the Sixth Circuit issued its decision, reported at 226 F.3d 696. Each of the members of the three judge panel issued a separate opinion. In a split decision (Judges Siler and Cole), the Sixth Circuit panel ruled that this Court did have the authority to conduct an evidentiary hearing and to expand the record on Petitioner's claims. However, also in a split decision, the Sixth Circuit

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[2] *See* Response to Respondent's First Motion for Summary Judgment, pp. 45-52 (Docket No. 91).

panel *sua sponte* addressed the issue that Respondent had never raised and therefore had abandoned on appeal, and that the parties neither briefed nor argued in the appeal: whether this Court's evidentiary record supports a finding of ineffective assistance of counsel at sentencing. On this issue, the majority of the panel (Judges Siler and Batchelder) ruled that this Court's finding of ineffective assistance of counsel at sentencing was in error, and accordingly the Sixth Circuit reversed this Court's finding of prejudice at sentencing and vacated this Court's judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence. *Id.* at 715. Judge Cole dissented.

12. Petitioner filed a Petition with the Sixth Circuit requesting a rehearing or a rehearing *en banc*. Respondent was directed to respond to this Petition and this Petition was circulated to the full Court. This Motion was subsequently denied.

13. Petitioner filed with the United States Supreme Court a Petition for a Writ of Certiorari. This Petition, Respondent's Response, and the other briefs filed in support of this Petition, have been filed with this Court. (*See* Docket Nos. 240-245).

14. On October 9, 2001, the Supreme Court just denied Petitioner's petition for certiorari. Out of deference to the Supreme Court, Petitioner's counsel have waited until the Supreme Court ruled on the petition for certiorari before filing this Motion.

15. On October 10, 2001, Petitioner filed with the United States Court of Appeals for the Sixth Circuit a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings. The Sixth Circuit directed Respondent to respond to this Petition. Respondent filed a Response, and Petitioner filed a Reply to the Response. Copies of these papers (without accompanying appendices) have been filed with this Court. *See* Petitioner's Status Report Dated November __, 2001, being filed contemporaneously herewith. Petitioner also intends to file

with the Supreme Court a petition for rehearing of the order denying Petitioner's petition for certiorari. *See* Rule 44.2 of the Rules of the Supreme Court (allowing 25 days for the filing of such a petition).

TENNESSEE SUPREME COURT RULE 39

16. On June 28, 2001, while Petitioner's United States Supreme Court petition for certiorari was pending, the Tennessee Supreme Court clarified pre-existing Tennessee law on exhaustion of claims by issuing an Order which established new Rule 39 of the Rules of the Supreme Court of the State of Tennessee, a copy of which is attached hereto as Exhibit A. This Order provides:

> In 1967 the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn.R.App.Proc.11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.
>
> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court

of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

17. Tenn.S.Ct.R. 39 unambiguously demonstrates that a Tennessee Appellate Rule 11 discretionary appeal to the Tennessee Supreme Court has never been available under Tennessee law in order to exhaust state remedies. This Court must give sanction to the Tennessee Supreme Court's interpretation of the exhaustion requirements in Tennessee.

18. Based upon Tenn.S.Ct.R. 39, it is now apparent that this Court erred in dismissing a substantial body of Petitioner's prosecutorial misconduct claims on "non-exhaustion" and "procedural default" grounds. As set forth below, these claims were properly presented to the Tennessee Court of Criminal Appeals in Petitioner's state post-conviction appeal and were therefore exhausted and preserved for federal habeas review.

THE PROPERLY PRESENTED AND EXHAUSTED CLAIMS

19. Attached hereto as Exhibit B is a true copy of the Brief of Appellant timely filed on April 25, 1994, with the Tennessee Court of Criminal Appeals in Petitioner's appeal as of right from the trial court judgment in the state post-

conviction proceeding. In accordance with Tenn.S.Ct.R. 39, all of the claims stated in this Brief were properly exhausted.

20. The properly exhausted prosecutorial misconduct claims that Petitioner presented in his state court appeals as of right and that this Court must consider on the merits in this habeas proceeding are set forth in Petitioner's Amended Petition under the following paragraphs:

Claim D.1.(1). Brady violation -- prosecution's failure to produce 1972 murder trial transcript.

Claim D.1.(2). Brady violation -- Prosecution's failure to produce transcription of Miller's pretrial statement.

Claim D.1.(3). Brady violation -- Prosecution's failure to produce Miller's statements to the prosecution regarding the involvement of the SEGM in the alleged offenses.

Claim D.1.(4). Brady violation -- Prosecution's failure to produce other Miller statements.

Claim D.1.(6). Brady violation -- Prosecution's failure to produce the redacted portion of Detective Garafola's report.

Claim D.1.(7). Brady violation -- Prosecution failure to produce lab reports indicating no blood stains on clothes.

Claim D.1.(8). Brady violation -- Prosecution's failure to produce other police reports.

Claim D.1.(12). Brady violation -- Prosecution's failure to produce information about Petitioner's bank account.

Claim D.2.(1). Altering evidence -- Prosecution's improper alteration of Miller's testimony.

Claim D.2.(2). Altering evidence -- Prosecution's false and misleading information to MTMHI.

Claim D.2.(3). Altering evidence -- Prosecution's improper manipulation of Norman's testimony.

Claim D.3. Prosecution's is representations to defense counsel regarding the prior 1972 conviction.

Claim D.6. Sentencing stage misconduct -- Prosecution violated trial court's instructions and passed inadmissible information to the jury after assuring the trial court that would not happen.

Claim D.8.(4). Prosecutorial Misconduct -- Prosecution made improper sentencing stage instruction regarding the SGM.

CUMULATIVE EFFECT OF THESE CLAIMS

21. Prosecutorial misconduct claims must be considered by the Court in the context of, and cumulatively with, all of Petitioner's other claims; these kinds of claims cannot be considered in isolation, "standing alone."

22. Accordingly, the prosecutorial misconduct claims identified in Paragraph 21 above that were improperly dismissed by this Court must be considered cumulatively with all of Petitioner's other claims, including: those prosecutorial misconduct claims that this Court did previously consider [the ¶ D.1.(1) Brady claim relating to the 1972 transcript, the ¶ D.1.(7) claim relating to the blood evidence, the ¶ C.7.(1) claim relating to the "Heinous, Atrocious and Cruel" sentencing stage instruction and aggravator,[3] and the ¶ D.6

[3] The ¶ C.7.(1) relating to the unconstitutional "Heinous, Atrocious and Cruel" aggravator and sentencing stage jury instruction was rejected by this Court. (Docket No. 123). Petitioner appealed this ruling to the Sixth Circuit. The Sixth Circuit did not uphold the constitutionality of this aggravator and sentencing stage instruction, but denied this claim on the separate ground that the "error" was "harmless in that it did not have a substantial and injurious effect or influence in determining the jury's verdict." 226 F.3d at 711. The Sixth Circuit, however, explicitly considered this claim in isolation, without viewing it in the context of the unpresented mitigation evidence or the combined effects of the ineffectiveness of Petitioner's trial counsel and the prosecutorial misconduct in this case. As other claims are addressed on the merits, this claim must be reevaluated under a new harmless error analysis that views this claim in the context of all and cumulatively with the other errors in the case.

claim relating to the prosecution's presentation of inadmissible information to the jury]; and Petitioner's ineffective assistance of counsel claims at both the guilt and sentencing stages of Petitioner's trial. These claims must be cumulated to determine (i) guilt stage issues, including but not limited to Petitioner's defenses that, based on the blood evidence, he was not the assailant and, based upon the mental health evidence, he was insane or at least lacked the *mens rea* for first degree capital murder; (ii) the effect of the viable but unpresented guilt stage defenses on the sentencing stage prejudice analysis; and (iii) the effect of all the errors on the prejudice Petitioner suffered at the sentencing stage. To the extent this Court has previously addressed these other claims, this Court must reconsider them in light of the cumulative effect created by all of the errors that occurred in this case.

23. As this Court previously found, this is a case where "abundant," "compelling," and important evidence was never investigated by Petitioner's trial counsel and therefore never presented to the jury. But, when all of Petitioner's claims are viewed cumulatively and in context, this case is more than that. The foregoing prosecutorial misconduct claims, when considered in their totality along with the other errors in this case, establish more than the withholding of evidence and even more than individual instances of intentional prosecutorial fraud and deception. They also establish a

deliberate pattern and scheme of prosecutorial fraud and deception during the entire course of the case, from indictment to sentencing. Because of the prosecution's persistent and deliberate pattern of misconduct combined with the ineffective assistance of defense counsel and other errors in this case, the jury was presented with a completely false picture of every aspect of this case. As a result of all of wrongs, Petitioner's trial was a sham. Petitioner never had his day in court. There can be no confidence in the outcome of Petitioner's capital trial with respect to either guilt or sentencing.

24. The prosecutorial misconduct claims provide independent and sufficient grounds for granting Petitioner relief. The fraud and deception practiced by the prosecution amounts to a *per se* violation of Petitioner's due process and Eighth Amendment rights. Moreover, the prosecutorial misconduct claims, when viewed cumulatively along with Petitioner's ineffective assistance of counsel claims and the other errors that occurred in Petitioner's case, establish that Petitioner was grossly prejudiced at both the guilt and sentencing stages of Petitioner's trial.

RULE 60(b) GROUNDS FOR RELIEF

25. Fed.R.Civ.P. 60(b)(6) allows the Court to relieve a party from a final judgment or order, upon such terms as are just, "for any reason justifying relief from the operation of the judgment."

26. Rule 60(b)(6) vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. When a federal court denies relief based upon its understanding and application of state law, but a subsequent action by the state supreme court establishes that the federal court misunderstood state law, relief under Rule 60(b)(6) is appropriate to ensure justice. Rule 60(b)(6) relief is particularly appropriate in habeas proceedings involving extraordinary circumstances, such as Petitioner's case, in which conventional notions of finality have no place.

27. The claims asserted by Petitioner in this Motion are not new claims, but are claims that were asserted from the outset of this habeas proceeding. The evidence supporting these claims is contained in the evidentiary record already established in this proceeding. Cf. Petitioner's Post-Hearing Brief, pp. 49-79 (Docket No. 202). Accordingly, this motion does not constitute a "successive" or "second" habeas petition.

28. In light of the recent promulgation of Tenn.S.Ct.R. 39, it is clear that this Court's dismissal of a substantial body of Petitioner's prosecutorial misconduct claims was in error. The improperly dismissed claims, viewed both independently and cumulatively along with Petitioner's ineffective assistance of counsel claims, establish that Petitioner should be granted habeas relief.

29. For all of the reasons stated above, Rule 60(b)(6) relief is warranted because of the existence of extraordinary circumstances and because the April 1998 Judgment would cause extreme and undue hardship, to say the least. It would be a profound and irreparable miscarriage of justice to deny Petitioner the relief requested herein.[4]

30. In support of the relief requested herein, Petitioner relies upon the entire record in this case.

WHEREFORE, Petitioner prays for the following relief:

1. Withholding of the issuance of any final judgment or mandate until this motion can be fully considered by the Court.

2. Oral argument on this Motion.

3. An Order indicating that this Court is inclined to grant this Motion and permitting Petitioner to file any appropriate

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[4] It would be a cruel irony to preclude Petitioner from presenting his prosecutorial misconduct claims only because his state court-appointed counsel failed to present those claims in a petition for discretionary appeal in the state proceedings when, in this federal habeas proceeding, the Sixth Circuit reinstated Petitioner's death sentence on a ground that was never presented and was therefore abandoned by the state in its appeal.

or necessary motion with the Sixth Circuit for a remand of the case on appeal for purposes of deciding this Motion; and, in that connection, certification of an order to the Sixth Circuit requesting that the record of this case be returned to this Court so that this Motion can be decided.

4. An Order granting Petitioner relief from this Court's April 1998 Order, and declaring that all of Petitioner's prosecutorial misconduct claims described above were properly exhausted in the state proceedings and shall be addressed on the merits by this Court in this habeas proceeding.

5. Upon final review of all of Petitioner's claims, viewed both independently and cumulatively, an Order granting Petitioner a writ of habeas corpus setting aside Petitioner's convictions and sentences.

6. Such other relief as the Court may find appropriate in the interests of justice.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN
v.
RICKY BELL, Warden

No. 3:96-0380
Capital Habeas Corpus
Oral Argument Requested

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED.R.CIV.P. 60(b)

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I. Introduction

In 1998 this Court ruled that Petitioner's claims of prosecutorial misconduct had not been exhausted in state court and were therefore defaulted. This was error. Tennessee Supreme Court Rule 39 (hereinafter "Rule 39"), promulgated in June of this year, clarified that, since 1967, a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes. This Court's dismissal of the prosecutorial misconduct claims prevented a full consideration of the cumulative effects of all instances of prosecutorial misconduct within the context of the ineffective assistance of counsel at Petitioner's trial. While it is an extraordinary measure, the granting of a Rule 60(b) motion in this case is both proper and necessary. Justice requires a full and fair review of the cumulative effects of errors, fraud and deception committed by the attorneys at trial. Further, it requires a ruling on the likely result of the trial had the jury been presented with full, fair and accurate proof about the offense and the Petitioner himself.

A. All material and significant aspects of this case were prejudicially distorted by the deceit of the prosecution and the failures of defense counsel.

The law requires that prosecutorial misconduct and the failures of defense counsel be considered together in order to determine whether the result of the trial was fair and reliable. This memorandum describes how prosecutorial misconduct and ineffective assistance of counsel in Petitioner's case created a trial that was fundamentally unfair and led to an outcome that was highly unreliable. It details instances in which the prosecution intentionally withheld exculpatory information and engaged in fraud and deception. It also reviews the instances in which defense counsel failed to present Petitioner's defenses and to rebut the prosecutor's fraudulent case.

Collectively, the errors of prosecution and defense distorted every material aspect of this case including: (i)

Petitioner's altruistic motives rather than criminal intent; (ii) the influence on Petitioner of the Southeastern Gospel Ministry (SGM) and the role of members of the SGM in the commission of the offense; (iii) Petitioner's non-involvement in the stabbing of the victims; (iv) potential but unpresented guilt stage and sentencing stage mental state defenses; (v) the inadmissible and rebuttable prosecution proof regarding Petitioner's prior criminal convictions; and (vi) compelling mitigating evidence that was available, but unpresented, to the jury.

Appendix A is a summary of the instances in which the nonfeasance and malfeasance of the prosecutor and the defense attorney, collectively and cumulatively, eliminated any opportunity that the trial of this case had to be fair and reliable.

B. State and federal courts collaterally reviewing this case have recognized that the trial was severely flawed, even without cumulating error.

Every court, state and federal, that has collaterally reviewed this case has found that trial counsel's performance was constitutionally inadequate in both the guilt and sentencing stages. *See, e.g., Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1095. The disagreement among the reviewing courts with regard to the effectiveness of defense counsel has been the question of prejudice, not performance.

Upon the only presentation to date of a complete factual record of Petitioner's claims and defenses in this case, this Court found counsel's performance at sentencing to have been sufficiently prejudicial to require the sentence of death to be set aside. *Id.*, at 1091-1102. This Court found the unpresented mitigating evidence that the jury did not hear to be "very impress[ive]," "vivid," "significant," "extremely credible," "compelling," and "overwhelming." *Id.* The Court found the failures of trial counsel to provide this evidence to the sentencing jury to be "grave," "serious," "very significant," "substantial," "breathtaking[]," and "grievous." *Id.*

In reaching this decision, however, this Court improperly failed to consider the failures of counsel collectively and cumulatively with the instances of prosecutorial misconduct and other errors.

Upon circuit review, in a split decision, in which three different opinions were filed, one member of the three judge panel agreed with this Court. *See, Abdur-Rahman v Bell*, 226 F.3d 696, 719-724 (6th Cir. 2000). In dissent, Judge Cole recognized that trial counsel's "preparation for and presentation at the sentencing hearing, was constitutionally inadequate . . . . [in that counsel] completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence." *Id.* at 720. He further noted that had defense counsel investigated and prepared, the jury would have heard mitigation evidence that Petitioner "has a history of traumatic abuse as a child, that he had a long history of mental health problems, and treatments, and, finally, that Abdur'Rahman had previously been a productive member of society." *Id.* at 721. Thus, two of the four federal judges who have reviewed this case have found the deficient performance of counsel at the sentencing stage alone to be sufficient to require the sentence of death to be set aside.

The proof presented in this Court, that Petitioner's prejudice in the sentencing stage of the trial was a result of trial counsel's ineffectiveness, was so strong that the state did not even contest the merits of this Court's decision on appeal. Without advance notice to the parties or an opportunity to be heard, however, the majority of the circuit panel *sua sponte* reinstated the sentence of death on an issue that had been abandoned by the state, not included in the briefs, and not addressed during oral argument. Despite the presentation of an expansive record before this Court, the panel majority did not discuss the proof presented in support of the claim of the ineffectiveness of counsel at the sentencing stage, except in the most cursory and conclusory way.

Petitioner's petition to rehear with the Sixth Circuit Court

of Appeals that was circulated to the *en banc* court. Upon the information and belief of undersigned counsel, the vote among the then-active judges on the petition to rehear was as close as it possibly could have been without resulting in an order to rehear. Consequently, the petition to rehear was denied and the panel majority decision to reinstate the death sentence stood.

A petition for certiorari to the United States Supreme Court was denied on October 9, 2001. Petitioner filed a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for further Proceedings with the Sixth Circuit Court of Appeals, on October 10, 2001. That motion is presently pending before the Court of Appeals.

C. The post-trial reaction of trial jurors to information not presented at trial demonstrates that the result of the trial would have been different if available evidence had been presented.

The results of post-trial interviews of the jurors who deliberated in this case make it obvious that the outcome of the sentencing hearing would have been different if the available mitigating evidence had been presented to them. The original affidavits from eight of the jurors who deliberated in this case are being filed contemporaneously herewith.[1] Excerpts from each of the eight juror affidavits include the following:

Juror Bonnie M. Meyer: "In the sentencing stage of the trial, I did not want to give the defendant the death penalty. I did not think the evidence was strong enough for the death penalty. I was one of the last hold-outs on the jury to vote for

[1] The eight juror affidavits were before the United States Supreme Court on the Petition for a Writ of Certiorari that was denied on October 9, 2001. The juror affidavits were attached to the brief of *amici curiae*, the National Mental Health Association, et. al. The Court accepted the juror affidavits into the record over the state's motion to strike. *See*, *Abdur'Rahman v Bell*, 2001 WL 575672., Sup. Ct. No. 00-1742, October 9, 2001.

the death penalty. . . . If I had known anything about the defendant's background, that he had been abused as a child, and that he may have suffered from a mental disorder or mental illness that could help explain why he did what he did, then I do not believe I would have voted for the death penalty."

Juror Alice Stoddard: "I would have wanted to know then about Mr. Jones's history of mental illness and the nature of the facts about his 1972 murder conviction relating to homosexual assault against him. I would have been interested in the fact that no blood was found on Mr. Jones' coat and in particular I think that the facts of his childhood abuse and corresponding mental illness should have been made known to us as jurors in some detail. We would have wanted to consider all this evidence. I believe I would have voted for a life sentence for Mr. Jones rather than death had I heard the factual evidence I have just mentioned. I do not believe this information should have been withheld from us."

Juror Jimmy Swarner: "I would have wanted to hear everything about Mr. Jones' life before deciding on his sentence. I would have wanted to know all about the way his father treated him and about his mental problems. . . . I don't want Mr. Jones to be put to death."

Juror Scarlett McAllister Smith: "I certainly would have wanted to see the TBI lab report which showed Mr. Jones had no blood on his clothes. I would have wanted to know all about Mr. Jones' extensive mental health history including treatment, diagnoses, and attempted suicides. We should have been informed about the abuse experienced at the hands of his father which occurred when he was young. I really would have wanted to have heard from his wife about his behavior--talking to nonexistent people and animals--and also heard about his family's mental health problems."

Juror Yolanda Howard: "It is my belief I would have voted for life for Mr. Jones rather than death if I had heard the details of this man's life and the extent of his mental illness. We didn't have a chance to understand Mr. Jones at all

because we weren't informed. Another thing that really bothers me is we did not see the TBI lab report about the blood tests. It seems important that we should have known that no blood was found on Mr. Jones clothes, especially since they showed us pictures with all the blood in them. Seeing those pictures was really upsetting to me. It might really have made a difference to me if I had heard testimony about the lack of blood on Mr. Jones's clothes. Basically, I am upset that all this information was withheld from us in deciding this man's life. That is a hard decision to make and I think we should have had complete information."

Juror Loretta L. Galloway Simpson: "I am truly bothered by all the information withheld from us: no blood stains on Mr. Jones's clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I wouldn't want to have my case handled this way, if it had been me, not Mr. Jones. I would have wanted them to present everything about me - whether it was for me or against me. Mr. Jones sounds like he needs help. If he has mental problems, death is not the answer. I do not want Mr. Jones executed under these conditions. I absolutely, as a juror, would have wanted to have heard all the information about Mr. Jones before deciding his sentence - life or death. Given all the history of mental illness Mr. Jones has, I would have voted for a life sentence. I most definitely would have voted for life even then."

Jury Foreman Everett C. Stone III: "[I]t is my belief and opinion that this evidence would have made a significant difference in the sentencing phase of the trial. Further, given the nature of the evidence, I would further offer for consideration that the death penalty be over-turned in this case."

Juror James D. Wimberly: "We were not given information detailing Mr. Jones's mental illness and hospitalizations. I am truly bothered by all the information

withheld from us: no blood stains on Mr. Jones' clothes based on the TBI lab report, history of awful childhood abuse, the truth about his earlier conviction being related to homosexual threats against him in prison, to name part of what I am troubled about. I especially think we should have known the details of his previous murder conviction being related to homosexual threats in prison. That previous conviction swayed me to vote for death. The results would have been different at sentencing if I had heard the true facts."

The substance of these juror's affidavits further demonstrate both the unfairness and the unreliability of Petitioner's trial. There is more than a reasonable likelihood that the outcome of the trial would have been different had the jury not been deceived by the prosecutor and failed by the defense attorney. In Tennessee, if one juror holds out for a life sentence, the defendant avoids the death penalty. See T.C.A. 39-2-203(h). In light of this fact, it is virtually certain that, had the proper case been presented, the outcome of Petitioner's trial would have been different.

II. The relationship between claims deemed defaulted by this Court, O'Sullivan v. Boerckel, Tenn. Sup. Ct. R. 39, Tenn. R. App. P. 11, and F. R. C. P. 60(b).

A. This Court dismissed numerous claims as defaulted because they were not presented in a discretionary appeal to the Tennessee Supreme Court.

In his petition for writ of habeas corpus, Petitioner raised numerous claims of prosecutorial misconduct. *See, generally, Amended Petition For Writ Of Habeas Corpus*, pp. 53-75, ¶¶ D1-D8. In response to these claims, this Court found that many of them were procedurally defaulted because, although they were presented on appeal to the Tennessee Court of Criminal Appeals, such claims had not been presented to the Tennessee Supreme Court in an application for permission to appeal. *See, Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1080-1082 (M.D.Tenn. 1998). Particularly, *see*, 999 F.Supp. at 1082 n. 8, in which this

Court dismissed claims ¶¶ D1(2) through (6), D1(8) through (12), D2(1) through (3), D3, D5(1) through (4), D8(1) through (3), D8(5) through (8).

Before this Court's 1998 dismissal of the prosecutorial misconduct claims, Petitioner had maintained to this Court that he was only required by Tennessee law to seek review in the Tennessee Court of Criminal Appeals in order to satisfy federal exhaustion requirements. Petitioner maintained that he was not required to seek discretionary review in the Tennessee Supreme Court under Tenn. R. App. P. 11 (hereinafter "Rule 11"), on the basis that Rule 11 did not contemplate such an application as a prerequisite for federal exhaustion. *See, Petitioner's Response To Respondent's First Motion For Partial Summary Judgment* at 45-52, R. 91. Nevertheless, this Court rejected Petitioner's arguments and concluded that the substantial body of Petitioner's prosecutorial misconduct claims were defaulted on the ground that exhaustion required presentation -of claims in an application for discretionary review. In the course of reaching this conclusion, this Court relied on the authority of *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). *See*, *Abdur'Rahman, supra*, 999 F.Supp. at 1080. In fact, in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728 (1999), the United States Supreme Court resolved the split among the circuits and ruled consistently with the Sixth Circuit decision in *Silverburg*.[2] *See*, discussion, *infra*.

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[2] Because the Sixth Circuit's exhaustion rule was inconsistent with Petitioner's position, Petitioner concluded it to be futile to consume briefing space on appeal challenging the procedural ruling by this Court. The wisdom of Petitioner's decision in this regard was borne out by the Supreme Court's ruling in *O'Sullivan*, which was issued while the parties were preparing their Sixth Circuit briefs in this case. As will subsequently be explained in greater detail, while the *O'Sullivan* rule generally requires that claims be raised in a discretionary appeal to the state's highest court in order to exhaust for federal purposes, it left the door open for the states to have a contrary rule. Subsequent to *O'Sullivan*, the Tennessee Supreme Court stepped through this door and made it clear that its Rule 11 discretionary appeal had never been available for federal exhaustion. *See*, discussion, *infra*. The promulgation of Rule 39 with the sanction of the United States Supreme Court in *O'Sullivan* has rendered this Court's prior ruling on this issue incorrect and has made this Rule 60(b) motion possible.

B. Newly promulgated Rule 39 demonstrates that a discretionary appeal to the state Supreme Court is not available—and has never been available—for the purpose of federal exhaustion.

> *Determination of the meaning of a statute begins with the plain language of the statute itself. United States v. Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1030 (1989); *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988).

On June 28, 2001, the Tennessee Supreme Court issued an Order and released Tenn. S. Ct. R. 39 which emphasizes that, since 1967, permission to appeal to the Tennessee Supreme Court following any denial of relief by the Tennessee Court of Criminal Appeals is not, and has not been, available for the purpose of federal exhaustion. *See, Order*, filed June 28, 2001 promulgating Rule 39, attached hereto as Appendix B. Rule 39 supports Petitioner's assertions in this Court, that his post-conviction claims were exhausted so long as they were presented to the Tennessee Court of Criminal Appeals. Rule 39 states:

> From criminal convictions or post-conviction relief matters **from and after July 1, 1967, a litigant shall not be required** to petition for rehearing or to file an application for permission **to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error**. Rather, when the claim has been presented to

> the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. (Emphasis added.)

The Preamble to Rule 39 provides, as follows:

> In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. **Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11.** We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below. (Emphasis added.)

Rule 39 applies "in all appeals from post-conviction relief matters from and after July 1, 1967," and therefore applies to all of the claims in this case.

In contrast, a Rule 11 discretionary appeal is granted for purposes that concern the Tennessee Supreme Court's functions as the highest court in the state: i.e., uniformity of law, public policy, and supervisory authority. Tenn. R. App. P. 11 provides:

> (a) An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's decision, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

In fact, the Advisory Commission Comments to this rule provide that a Rule 11 application "is not designed to serve the office of arguing the merits of the decision of the intermediate appellate court." Consistently, the state's Answer in Opposition to Application for Permission to Appeal in response to Petitioner's Rule 11 application in this case argued:

> The petitioner is merely asking this Court for another review of the trial court's dismissal of the post-conviction petition. Petitioner has not demonstrated the existence of reasons such as would permit discretionary review by this Court.

State's Opposition at 2. This argument defies the purpose of the federal execution doctrine, which is precisely to insure that the state courts have an opportunity to rule on the merits of claims challenging state court convictions prior to any federal action.

Taken together, Rule 39, the Preamble to Rule 39, and Rule 11 make it clear that since the creation of the Tennessee

Court of Criminal Appeals in 1967[3], any application to the Tennessee Supreme Court from a decision of the Tennessee Court of Criminal Appeals has not been an appeal of right, but rather has been an appeal governed by Rule 11 as applied within the discretion of the Supreme Court. The Rule 11 discretionary appeal has always been limited to claims "where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11." Preamble to Rule 39. Accordingly, as Rule 39 makes clear, the limitations imposed on discretionary appeals by Rule 11 do not include federal exhaustion. Thus, in this case, a Rule 11 discretionary appeal was not available for the exhaustion of Petitioner's claims.

Further, this case presents no question concerning the retroactive or retrospective application of Rule 39, since the Rule only memorializes what the law has been since 1967 and was in 1995, after the Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief, when the only discretionary appeal was sought in Petitioner's case.

C. Federal courts recognize the authority of a state's highest court to determine that claims need not be raised in a state discretionary appeal to the highest court in order to satisfy federal exhaustion requirements.

> *It would be a strange rule of federalism that ignores the view of the highest Court of a*

[3] Also on July 1, 1967, the Tennessee Post-Conviction Procedures Act took effect. Tenn. Pub. Acts, Ch. 310, formerly codified at T.C.A. § 40-3801, *et seq.*, and currently codified at T.C.A. § 40-30-101, *et seq.* The state post-conviction procedures are defined solely by the statute that codifies them. Both the Court of Criminal Appeals and the state post-conviction procedures therefore were created the same day in 1967. Although it is not stated in Rule 39 and does not need to be stated, the co-extensive life since July 1, 1967 of the intermediate appellate court in criminal cases and the state post-conviction procedures is another logical reason that the Tennessee Supreme Court directed that Rule 39 shall apply, beginning on July 1, 1967.

> *State as to the meaning of its own law. Stringer v. Black*, 503 U.S. 222, 235, 112 S.Ct. 1130, 1139 (1992).

In *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728 (1999), the Court's majority opinion found that the federal exhaustion requirement did require presentation in state court of claims in a discretionary appeal. The rule of the majority, however, was based on notions of comity, i.e., deference by the federal courts to the review by state courts of state court convictions. The majority, therefore, observed:

> We acknowledge that the rule we announce today – requiring state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State – has the potential to increase the number of filings in state supreme courts. We also recognize that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court. (Citations to South Carolina and Arizona supreme court rulings that decided not to require the presentation of claims in order to satisfy federal exhaustion omitted). Under these circumstances, O'Sullivan may be correct that the increased, unwelcome burden on state supreme courts disserves the comity interests underlying the exhaustion doctrine.

119 S.Ct. at 1733-34. Justice Stevens' dissenting opinion, joined by Justices Ginsburg and Breyer, noted that the imposition of the exhaustion requirement on discretionary state court appeals "will impose unnecessary burdens on habeas petitioners; it will delay the completion of litigation that is already more protracted than it should be; and most

ironically, it will undermine federalism by thwarting the interests of those state supreme courts that administer discretionary dockets." *Id.* at 1739.

Justices Stevens, Ginsburg, and Breyer pointed out that the majority "leaves open the possibility that the state supreme courts may avoid a deluge of undesirable claims by making a plain statement – as Arizona and South Carolina have done – that they do not wish the opportunity to review such claims before they pass into the federal system." *Id.* at 1740. These justices "agree[d] with Justice Souter [in his concurring opinion]. . . that a proper conception of comity obviously requires deference to such a policy," *Id.*. These Justices concluded: "The key point is that federal courts should not find procedural default when a prisoner has relied on a state supreme court's explicit statement that criminal defendants need not present to it every claim that they might wish to assert as a ground for relief in federal habeas proceedings." *Id.* at 1741. There would be no default so long as the state court has taken the "step of expressly disavowing any desire to be presented with every such claim." *Id.*

Thus, in *O'Sullivan*, the Court created "a kind of presumption that a habeas petitioner must raise a given claim in a petition for discretionary review in state court prior to raising that claim on federal habeas but the State could rebut the presumption through state law by clearly expressing a desire to the contrary." *Id.*, at 1741-42. Indeed, the Supreme Court mentioned South Carolina and Arizona as examples of states which, based upon statements from their respective supreme courts, might express "contrary preferences." *Id.*, at 1741-42. *See, also*, the majority opinion, 119 S.Ct. at 1734, which cites and relies upon the statements by the Supreme Courts of South Carolina and Arizona, which did not require litigants to raise claims in discretionary appeals in order to satisfy federal exhaustion.

The Arizona rule is very similar to Tennessee Supreme Court Rule 39 in pertinent part. The Ninth Circuit Court of Appeals was confronted with the Arizona rule in *Swoopes v. Sublett*, 196 F.3d 1008 (9th Cir. 1999), and recognized that the majority in *O'Sullivan* "acknowledged an exception relating to 'any specific state remedy when a State has provided that that remedy is unavailable.'" 196 F.3d at 1009. The remedy need not be exhausted "so long as the state has identified the procedure as outside the standard review process and has plainly said that it need not be sought for the purpose of exhaustion." *Id.* at 1009-10, citing *O'Sullivan*, 119 S.Ct. at 1735 (Souter, J., concurring). The Ninth Circuit concluded:

> In sum, the Arizona Supreme Court has announced that . . . review need not be sought before the Arizona Supreme Court in order to exhaust state remedies. Thus post-conviction review before the Arizona Supreme Court is a remedy that is 'unavailable' within the meaning of *O'Sullivan*. . . . Recognizing that 'each state is entitled to formulate its own system of post-conviction relief, and ought to be able to administer that system free of federal interference, *see Nino v. Galaza*, 183 F.3d 1003, 1007 (9th Cir. 1999), we must credit Arizona's choice.

196 F.3d at 1010.

In addition, the Pennsylvania Supreme Court issued a *per curiam* order establishing a rule similar to Rule 39. *See, In Re: Exhaustion Of State Remedies In Criminal And Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (hereinafter: Order No. 218). Order No. 218 is quoted and construed in *Balsi v. Attorney General of the Commonwealth of Pennsylvania*, 120 F.Supp.2d 451 (M.D.Penn. 2000). The *Balsi* court held:

> [W]e believe that we are bound to hold, and we do hold, that the order of the Supreme Court of Pennsylvania waives the exhaustion doctrine insofar as the doctrine requires a

> petitioner under § 2254 to present claims to the Supreme Court of Pennsylvania in a petition for allocatur prior to presenting them in federal court.[4]

In a later case, *Mattis v. Vaughn*, 128 F.Supp.2d 249, 255 n. 6 (E.D.Pa. 2001), another federal court from a different Pennsylvania district agreed. In *Mattis*, the court held:

> We hold therefore that Order No. 218 of the Pennsylvania Supreme Court has made such review 'unavailable' in Pennsylvania. . . . We agree also with the concurring and dissenting Justices in *O'Sullivan* that the interests of comity would be greatly disserved by ignoring the pronouncements of state supreme courts that they see no need for prisoners to petition them for discretionary review before the prisoners can seek federal habeas corpus relief.

128 F.Supp.2d at 259.

D. Rule 60(b) provides the authority and the procedural vehicle for this Court to address the issues presented in this motion.

As has been demonstrated, the United States Supreme Court has recognized the authority of states to set their own exhaustion rules. The Tennessee Supreme Court promulgated Rule 39 consistent with the state court rules contemplated in *O'Sullivan*, thereby highlighting this Court's misinterpretation of Tennessee's requirements for federal exhaustion. *See*, Rule 39. Because this Court denied relief based on an alleged procedural default that did not exist in Tennessee, this Court may grant relief from judgment under Rule 60(b), order further proceedings, and ultimately review

[4] The *Balsi* court so ruled ignoring the fact that "it would seem odd that a state court might dictate to a federal court the interpretation of a federal statute," i.e., the federal habeas exhaustion requirement. *See*, 120 F.Supp.2d at 465.

the merits of relevant claims. Rule 60(b) is the appropriate vehicle for correcting this Court's earlier error.

F. R. C. P. 60 provides relief from:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: .... (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) relief is properly obtained by motion in the court that rendered judgment. This Rule 60(b) motion is timely filed. It is based on the recent clarification of pre-existing law, i.e., Tenn. Sup. Ct. R. 39, promulgated on June 28, 2001. When Rule 39 was promulgated on June 28, 2001, this case was pending before the United States Supreme Court on a Petition for a Writ of Certiorari. That Petition was denied on October 9, 2001, a ruling that was issued without prior notice. Petitioner placed this Court on notice on October 10, 2001 of his intent to submit this motion. This motion is made based on the extraordinary circumstances herein described, and is a proper vehicle for the relief sought as set out in this motion and memorandum. Generally, *see*, 11 Wright & Miller, *Federal Practice and Procedure* (2d Ed., 1995) §§ 2851-2880.

"[Rule 60(b)(6)] vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 390 (1949). "Amended 609b) provides for setting aside a judgment for any one of five specified reasons or for any other reason justifying relief from the operation of the judgment. "*Id.*, 69

S.Ct. at 389.[5] Although a one year limitation on filing Rule 60(b) motions generally applies, it does not apply "under the `other reason' clause of 60(b)." *Id.* at 390.

Rule 60(b) "gives the courts a 'grand reservoir of equitable power to do justice in a particular case.'" *Pierce v. Cook Co.*, 518 F.2d 720, 722 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079 (1976). The Sixth Circuit has held that "Rule 60(b) is appropriate to accomplish justice in an extraordinary situation and is addressed to the sound discretion of the court." *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985). The fact that Petitioner's life is at stake, in and of itself, is an extraordinary circumstance, sufficient to require this Court to exercise its discretionary authority pursuant to Rule 60(b).

A Rule 60(b) motion is particularly appropriate in this case because of the unique characteristics of 28 U.S.C. § 2254 federal habeas cases. In *Matarese v. Lefevre*, 801 F.2d 98, 106 (2d. Cir. 1986), *cert. denied*, 480 U.S. 908 (1987), the Second Circuit held that finality as a limitation to the application of a Rule 60(b) motion in some cases has little relevance in the habeas context. The Second Circuit held that it is "particularly appropriate; for the District Court to

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[5] In *Schmitt v. American Family Mutual Insurance Company*, 187 F.R.D. 568 (S.D. Ind. 1999), the District Court held:

> Rule 60(b) of the Federal Rules of Civil Procedure authorizes relief from a court's judgment or order based on a variety of grounds, including mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or misconduct by the opposing party, lack of jurisdiction of the issuing; court, or prior satisfaction or release of the judgment. Rule 60(b)(6) adds a residual category authorizing relief for "any other reason justifying relief from the operation of the judgment." Rule 60 (b)(6) may be used to order relief from judgment only where "extraordinary circumstances" exist or where the judgment may cause "extreme and undue hardship."

Schmitt, 187 F.R.D. at 571.

entertain a Rule 60(b)(6) motion on the grounds of a retroactive change in the law in the context of a habeas corpus proceeding in which `conventional notions of finality have no place.'" *Matarese*, 801 F.2d at 106. "[T]he importance of the underlying action, petitioner's first and only application for a writ of habeas corpus, militates toward a grant of reconsideration." *Liberatore v. Mcguiness*,1998 U.S. Lexis 22842 (S.D.N.Y. 1998) (granting 60(b)(6) motion in habeas case to allow consideration of claims on the merits); *Hall v. Alabama*, 700 F.2d 1333 (11th Cir. 1983) (court entertained Rule 60(b) motion in habeas corpus proceeding).

The District Court in *Schmitt*, 187 F.R.D. at 573, held that when the interest in finality is "minimal to nonexistent" a change in state decisional law may constitute an extraordinary circumstance warranting Rule 60 (b) relief. If relief is granted pursuant to this Rule 60(b) motion, less of a hardship would obviously accrue to Respondent than would accrue to Petitioner, should it not be granted. A grant of relief would cause Respondent to *suffer* "minimal hardship," *Id.*, at 575. *See, also, Matarese v. LeFevre, supra*, 801 F.2d at 106 (relief should be granted "where the judgment may work an extreme and undue hardship"). In fact, a, grant of relief would cause Respondent no hardship at all. It would merely prevent the state from executing an unconstitutional judgment - something in which it has absolutely no interest. On the other hand, "[t]he hardship that [Petitioner] would suffer without relief from judgment is clear," *Schmitt, supra*, 187 F.R.D. at 576. Upon a denial of relief, Petitioner's hardship is that he would lose his life. "In order to prevent the working of extreme and undue hardship upon plaintiff, to accomplish substantial justice and to act with appropriate regard for the principles of federalism which underlie our dual judicial system in this extraordinary case," *DeWeerth v. Baldinger*, 804 F.Supp. 539, 551 (S.D.N.Y. 192), therefore, Petitioner is entitled to Rule 60(b) relief.

Changes in state and federal[6] law have frequently warranted Rule 60(b) relief in federal court. Examples in which changes in state law warranted relief in federal court include: *Overbee v. Van Waters*, 765 F.2d 578 (6th Cir. 1985) (relief in federal court after state supreme court reversed itself); *Cincinnati Insurance Co. v. Byers*, 151 F.3d 574 (6th. Cir. 1998) (same) *Schmitt, supra* (same); *Heirs-at-Law & Beneficiaries v. Dresser Industries*, 158 F.R.D. 89 (D.Miss. 1993) (same); *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (en banc decision that Rule 60(b)(6) relief was appropriate to ensure justice after state supreme court established that federal court misunderstood state law); *DeWeerth v. Baldinger, supra*, 804 F.Supp. at 541 (S.D.N.Y. 1992) ("Because of the primacy of the state courts in determining interpretation of state law under principles of federalism," an intervening action by a state supreme court "is a new development justifying Rule 60 relief."); *First American Bank v. Bonded Elevator Inc.*, 1986 U.S.Dist.Lexis 22885 (W.D.Ky. 1986) (relief from judgment ordered where Kentucky state court rendered decision adverse to prior federal ruling); *Sargent v. Columbia Forest Prod. Inc.*, 75 F.3d 86, 139 (2d Cir. 1996) (mandate recalled where intervening state court decision inconsistent with prior federal judgment); and *In Re Calano*, 2000 U.S.Dist.Lexis 1549 (E.D.La. 2000) (Rule 60(b) granted given intervening state statute).

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[6] Examples in which changes in federal law warranted relief in federal court: *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989) (change in relevant case law by United States Supreme Court warranted relief pursuant to Rule 60(b)(6)); *McGrath v. Potash*, 199 F.2d 166 (D.C.Cir. 1952) (intervening Congressional statute mandated relief from judgment under 60(b)(6)); *Manhattan Cable Television Inc. v. Cable Doctor*, 824 F.Supp. 34 (S.D.N.Y. 1993) (relief from judgment under 60(b)(6)); *Manhattan Cable Television Inc. v. Cable Doctor*, 824 F.Supp. 34 (S.D.N.Y 1993) (relief from judgment granted in light of new federal legislation).

In the present case, there is not even a change in state law. Rule 39 merely memorializes what has been the law in Tennessee since 1967 gives this Court the opportunity to correct the mistake made in its 1998 decision. The United States Supreme Court's decision in *O'Sullivan v. Boerckel*, the Tennessee Supreme Court through the promulgation of new Rule 39, and the application of old Rule 11 make this a classic case in which a relief from judgment should be sought with this Court pursuant to a Rule 60(b)(6).

E. This Rule 60(b) motion is not a second or successive habeas corpus petition because it raises no new claims, no new facts, and does not rely on new law.

Because it does not raise any new claims, this Rule 60(b) motion should not be treated by this Court as a second or successive habeas corpus petition. In *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2nd Cir. 2001), the Court found:

> A Motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).

Id., 252 F.3d at 198. *See, also, e.g., Ritter v. Smith*, 811 F.2d 1398 (11th Cir.1987) (following grant of habeas relief which became final, granting state's motion for relief from judgment based upon intervening United States Supreme Court decision calling into question validity of district court's initial grant of writ); *Scott v. Sin lea tare*, 870 F. Supp. 328 (S.D.Fla. 1994). The Court in *Rodriguez* also stated:

> [T]he procedural object of the motion authorized by Rule 60(b) is simply to vacate the federal judgment dismissing the habeas petition, not to vacate the state conviction. The fact that the court to which the motion is addressed might conceivably go farther and grant the habeas in

> response to the motion does not in our view make such a motion second habeas petition. The same would be true if, in the course of litigating the habeas, the petitioner moved for summary adjudication of his claim, or moved to quash the respondent's asserted defenses. In ruling on the motion in petitioner's favor, the court might go so far as to grant habeas, ruling that the conviction be vacated. It does not follow that such a motion should be considered a second petition.

Id.

This Rule 60(b) motion is unlike the Rule 60(b) relief sought in *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir.1 996), in which "approximately sixty additional issues [had been] raised by McQueen." *Id.* at 1334. Petitioner McQueen was "advancing new claims never included in the initial petition," *Id.* at 1335, and, thus, the Rule 60(b) motion in that case was, in fact, "the practical equivalent of a successive habeas corpus petition." *Id.*

In this matter, unlike the case in *McQueen*, Petitioner is raising no new claims. Moreover, Petitioner is presenting no new facts in support of the claims identified in his Rule 60 motion. All of the facts supporting these claims are established by the proof introduced in this Court's 1998 evidentiary hearing when Petitioner was presenting these very same claims. Nor is the Petitioner relying on new law under Tenn.S.Ct.Rule 39, which only memorializes pre-existing law that this Court previously misapplied.

F. This Court has the jurisdiction to entertain this Rule 60(b) motion, given the procedural status of this case.

This Court's jurisdiction to entertain the Rule 60(b) motion is clear, regardless of the current procedural status of this case. In *Herring v. Kennedy-Herring Hardware Co., Inc.*, 261 F.2d 202 (6th Cir. 1958), the Sixth Circuit Court of Appeals stated:

> The authority to grant a new trial under Rule 59(a) or to relieve a party from a final judgment under Rule 60(b), rules of Civil Procedure, rests with the District Court, not the Court of Appeals. In accordance with the procedure in an analogous situation, approved in *Smith v. Pollin*, 90 U.S.App.D.C. 178, 194 F.2d 349; see also: *Metcalf v. Untied States*, 6 Cir., 195 F.2d 213, 218; *Hamel v. United States*, 6 Cir., 135 F. 2d 969; appellant's motion seeking a new trial or relief from final judgment under either of those rules should be addressed to the District Court.

261 F. 2d at 203.

Petitioner, therefore, may bring his Rule 60(b) motion to the attention of the District Court when it is ripe, notwithstanding the pendency of an appeal in the case. On a habeas corpus petition challenging a state court conviction, the Court in *Browder v. Dir., Dept. of Corrections of Illinois*, 98 S.Ct. 556 (1978), recognized that a motion for relief from judgment is appropriate even after the district court has lost jurisdiction to grant relief on the petition. In *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1991), the Sixth Circuit stated that it "has consistently held that a district court retains jurisdiction to proceed with matters that are in aid of the appeal."

> The district court is the proper forum to determine in the first instance whether there is sufficient basis to overturn the judgments." Furthermore, litigants who seek Rule 60(b) relief typically cannot wait until an appeal has been concluded to request such relief because the period during which the case is on appeal counts toward determining whether a Rule 60(b) motion is timely filed. For this reason, as the parties agree, litigants must be permitted to

file these motions in the district court even while an appeal is pending.

Fobian v. Storage Technology Corp., 164 F.3d 887, 889 (4th Cir.1999)(internal citations omitted). In *First Nat'l Bank Salem, Ohio v Hirsch*, 535 F.2d 343 (6th Cir. 1976), the Sixth Circuit panel stated: "If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand" in the Sixth Circuit Court of Appeals if an appeal is pending. *Id.*, 535 F.2d at 346. *See*, also, *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979); *Carriger v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992).

In accordance with the foregoing authorities, therefore, Petitioner is requesting this Court to make an initial determination concerning its inclination to hear Petitioner's Rule 60 motion. If this Court elects to hear the motion, it could notify Petitioner and Petitioner will move the Sixth Circuit Court of Appeals to remand the case to this Court to decide the motion. Further, if the record has been filed in the Court of Appeals and this Court needs the record in order to rule on the Rule 60(b) motion, "the district court may certify an order to the court of appeals requesting that the district court record be returned so that the Rule 60(b) motion may be decided. *See, e.g., Kelley v. Metropolitan City Board of* Education of Nashville, Tenn., 463 F.2d 732, 745 n. 3 (6th Cir. 1972), cert. denied 409 U.S. 1001, 93 S.Ct. 322, 34 L.Ed.2d 262 (1972)." *First Nat'l Bank Salem, Ohio, supra*, 535 F.2d at 346 n. 2.

III. The applicable legal standards for prosecutorial misconduct and ineffective assistance of counsel

> *The prosecutor must act as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but*

> *that justice shall be done. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Judge v. State*, 539 .W.2d 340, 344 (Tenn. Crim. Ap. 1976) (quoting *Berger v. United States*, 295 U.S. at 88.).
>
> *He is to judge between the people and the government; he is to be the safeguard of the one and the advocate for the rights of the other; he ought not to suffer the innocent to be oppressed or vexatiously harassed, anymore than those who deserve prosecution to escape; he is to pursue guilt; he is to protect innocence. . . . Fout v. State*, 4 Tenn. 98, 99 (1816)[7]

A. The standards for measuring prosecutorial misconduct and ineffective assistance of counsel are the same.

The same legal standard applies to measure both the materiality resulting from prosecutorial misconduct and the prejudice resulting from the ineffectiveness of counsel. As this Court has noted, the applicable standard for both general categories of constitutional violations is: "a reasonable probability that . . . the result of the proceeding would have been different," but for the misconduct of the prosecutor, *see Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1088 (M.D.Tenn. 1998), and the failures of counsel, *see Id.*, at 1092. *See, also, Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995) (application of the above-quoted standard as the test for materiality for *Brady*

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[7] This quote from *Fout v. State* introduces the "Death Penalty Guidelines," issued October 18, 2001 by the Office of the District Attorney General of the 20th Judicial District, the same office that employs ADA John Zimmermann, who prosecuted this case. *See*, Appendix C.

claims); *Strickland v. Washington*, 104 S.Ct. 2052, 2068 (1984) (application of the standard for the test of materiality in prosecutorial misconduct claims is the same standard as the test for prejudice resulting from ineffective assistance of counsel)[8]. As this Court has noted, a probability is "reasonable" if it "undermines confidence in the outcome," whether with reference to claims of prosecutorial misconduct, *Abdur'Rahman*, *supra*, 999 F.Supp. at 1090, or claims of ineffective assistance of counsel, *Id.* at 1092.

B. The *Brady* and *Strickland* tests do not require Petitioner to demonstrate that, but for the errors, the outcome of the trial would have been different.

The test is not an outcome determinative test. Petitioner is only required to demonstrate that doubt is cast on the result of the trial so that it undermines confidence in its outcome because of the errors. As the Sixth Circuit has recognized:

> [T]he "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." [*Kyles v. Whitley*], at 434, 115 S.Ct. 1555; *Frost*, 125 F.3d at 382-83 (6th Cir. 1997). Nor does the defendant need to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35, 115 S.Ct. 1555; *United States v. Smith*, 77 F.3d 511, 515 (D.C.Cir. 1996) (materiality requirement is not a sufficiency-of-the-evidence test.)

Schledwitz v. United States, 169 F.3d 1003, 1012 (6th Cir. 1999).

C. *Brady* and *Strickland* errors are to be considered collectively or cumulatively and the ultimate question is whether the trial was rendered unfair by the cumulation of error.

> *We consider the cumulative effect of multiple trial errors in determining whether relief is warranted. Phillips v. Woodford*, 2001 WL 1230674, 9th Cir. No. 98-99022, filed October 15, 2001, at 15.

Whether ineffective assistance of counsel, prosecutorial misconduct, or both are under review, the fundamental question is whether the trial was fair; and whether errors committed during the course of the trial, considered together, rendered the trial unfair. The United States Supreme Court noted in *Strickland v. Washington*, *supra*, 466 U.S. at 696, that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged;" and in *United States v. Bagley*, 473 U.S. 667, 674-75 (1985), a progeny of *Brady*, the Court stated: "'A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.' (quoting *United States v. Agurs*, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)."

In order to judge the fairness of the trial and the reliability of its outcome, it is incumbent on the reviewing court to consider the cumulative effect of multiple errors committed in the trial. In *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), the Court stated:

> We do not need to decide whether these deficiencies alone meet the prejudice standard because other significant errors occurred that,

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[8] The Court in *Strickland* specifically recognized that "the appropriate test for prejudice finds its roots in the test for materiality if exculpatory information not disclosed to the defense by the prosecution, *United States v. Agurs*, 96 S.Ct. 2392, 2397 (1976) . . . ." *Strickland*, *supra*, 104 S.Ct. at 2068.

> considered cumulatively, compel affirmance of the district court's grant of habeas corpus as to the sentence of death. *See United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983) ("a court may find unfairness -- and thus prejudice -- from the totality of counsel's errors and omissions"); *Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir. 1979)("prejudice may result from the cumulative impact of multiple deficiencies", quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

Id. at 622. In *Gonzales v. McKune*, 247 F.3d 1066, 1078 (10th Cir. 2001), the Court found that the outcome of the trial "would likely have changed in light of a combination of *Strickland* and *Brady* errors, even though neither test would individually support a petitioner's claim for habeas relief." In that case, the Court also stated: "[B]oth tests[*Strickland* and *Brady*] were established to preserve the integrity of the process, and they adopt similar standards to reach this goal." *Id.*, 247 F.3d at 1078. *See also Phillips v. Woodford*, 2001 WL 1230674, 9th Cir. No. 98-99022, filed October 15, 2001, at 15-16 (Court cumulated prejudice as a result of ineffective assistance of counsel with the materiality resulting from *Brady*-like claim, i.e. prosecution allowed its witness to falsely testify that he had no deals.).

The Sixth Circuit Court of Appeals has recognized that "a reviewing court is to consider the collective effect" of the errors. *Schledwitz*, *supra*, 169 F.3d at 1088. Relying on the United States Supreme Court's ruling in *Kyles v. Whitley*, *supra*, the Sixth Circuit Court of Appeals stated in *Schledwitz*:

> [I]n determining whether undisclosed evidence is material, the suppressed evidence is considered collectively, rather than item-by-item, to determine if the "reasonable

> probability" test is met." *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555; *Frost*, 125 F.3d at 383.

169 F.3d at 1012.

This approach reflects the common sense reality that the jury's verdicts at guilt and sentencing were the product of the total body of evidence presented to them and not merely isolated parts of that body of evidence. It is incumbent on the reviewing court "to consider the collective effect," *Id.*, of the various errors in its determination of whether the errors "undermine[] confidence in the outcome," *Id.*, *Abdur'Rahman v. Bell*, 999 F.Supp. at 1090.

D. Particularly because the prosecution intentionally deceived the court and jury, a new trial is required.

> *[D]eliberate deception of a court and jurors by the presentation of known false evidence cannot be reconciled with the rudimentary demands of justice. Mooney v. Holohan*, 55 S.Ct. 340 (1935).

The Due Process Clause of the Fourteenth Amendment prohibits a conviction obtained through the use of false evidence. *See, e.g., Pyle v. Kansas*, 63 S.Ct. 177 (1942); *Napue v. Illinois*, 79 S.Ct. 1173 (1959). The same is true for a conviction obtained when the prosecution solicits false evidence and allows it to go uncorrected when it appears. *See, e.g., Alcorta v. State of Texas*, 78 S.Ct. 103 (1957); *Napue*, 79 S.Ct. at 1177. "The principle that a State may not use false evidence, including false testimony, to obtain a tainted conviction, [is] implicit in any concept of ordered liberty." *Id.*

> Indeed, if it is established that the government knowingly permitted the introduction of false testimony, reversal is "virtually automatic." *United States v. Stofsky*, 527 F.2d 237, 243 (2nd Cir. 1975) (citing *Napue v. Illinois*, citation omitted).

United States v. Wallach, 935 F.2d 445, 456 (2nd Cir. 1991).

The prosecutor has an obligation to refrain from intentional deception, an obligation higher even than his obligation to provide exculpatory evidence in compliance with *Brady*. This obligation to refrain from intentional deception applies to intentional misrepresentations as well as the presentation of false testimony. In *United States v. Valentine*, 830 F.2d 565 (2nd Cir. 1987), the Court specifically found that the prosecution had violated "the due process prohibition against a prosecutor's making 'knowing use of false evidence', including by misrepresenting the nature of nontestimonial evidence." 830 F.2d at 570-71. The Court stated:

> In analyzing severity [of prosecutorial misconduct], among the elements to consider is the "extent to which the misconduct was intentional". *Id.* [i.e. *United States v. Mordica*, 663 F.2d 1173, 1181 (2nd Cir. 1981) per curiam] *See United States v. Universita*, 298 F.2d 365, 367 (2nd Cir.) ("The prosecutor has a special duty not to mislead; the government should, of course, never make affirmative statements contrary to what it knows to be the truth.")

Id. at 570. In *Davis v. Zant*, 36 F.3d 1538 (11th cir. 1994), the Court stated:

> [T]he prosecutor's misrepresentations were deliberately placed before the jury. In this particular case, the clearly intentional nature of the misrepresentations weighs heavily in favor of [the habeas Petitioner]; such as a patently dishonest argument brings this case close to the more traditionally established forms of misconduct such as the proscription against a prosecutor's knowing use of false testimony (citations omitted), or the knowing use of false evidence. *See, Brooks*, 762 F.2d at 1402, n. 26 ("... [T]here may be cases where the prosecutor's intentional conduct rises to a level equivalent to a knowing use of false evidence.")

36 F. 3d at 1550.[9]

The standard imposed on the prosecution is greater and a conviction thereby obtained is more likely reversed when the prosecution knowingly and intentionally deceives the court. As established by the United States Supreme Court, the proper standard to apply is as follows:

> [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

Kyles, supra, 115 S.Ct. at 1565 n. 7 (1995); *United States v. Bagley*, 473 U.S. 667, 679 n. 9 (1985); *United States v. Agurs*, 96 S.Ct. 2392, 2397 (1976); *United States v. O'Dell*, 805 F.2d 637, 641 (6th Cir. 1986); *Brown v. Wainwright*, 785 F.2d 1457, 1463 (11th Cir. 1986). If the prosecutor intentionally misrepresents to the extent that Zimmermann did in this case, it is not necessary for Petitioner to show that there was "a reasonable **probability** that the outcome **would have been different**," as it would be if the prosecutor committed a *Brady* violation by withholding evidence. Petitioner must

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[9] Prosecutorial misconduct is also less acceptable under the Constitution when it is aimed at the core of the defense's case. See, e.g., *United States v. Harp*, 536 F.2d 601 (5th Cir. 1976) (A prosecutor's comment during closing argument regarding defendant's post-arrest silence would not be harmless error because it struck at the jugular of the defense.) relied on in *Davis v. Zant, supra*, 36 F.3d at 1550 n. 17.

only show that there is a **possibility**[10] that the outcome **could have been affected** when the prosecutor intentionally misrepresents.

E. *Brady* and *Strickland* claims are subject to *de novo* review; and, since Petitioner seeks no finding of purely historical fact in support of these claims that is inconsistent with state court findings, the § 2254(b) "presumption of correctness" does not apply.

"[W]hether Petitioner received effective assistance of counsel is a mixed question of fact and law, which is reviewed de novo." *Strickland v. Washington*, *supra,* 104 S.Ct. at 2070; *Abur'Rahman v. Bell*, *supra,* 999 F.Supp. at 1092. Allegations of prosecutorial misconduct are mixed questions of law and fact and are thus, also, reviewed by this Court *de novo*. *See*, *e.g.*, *Jones v. Gibson*, 206 F.3d 946, 958 (10th Cir. 2000). Since allegations of both ineffective assistant of counsel and prosecutorial misconduct involve mixed questions of law and fact, the § 2254(d) "presumption of correctness" that attaches to state court findings of purely historical fact, does not apply to the questions raised by this motion. *See*, *e.g.*, *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764 (1981).

Further, Petitioner does not even seek any finding of fact regarding ineffective assistance of counsel and prosecutorial misconduct claims that is inconsistent with state court findings of fact. As the Sixth Circuit Court of Appeals found in this case, Petitioner seeks no factual findings by this Court with regard to the ineffective assistance of counsel claims that is inconsistent with or contradictory to any state court finding of fact, including purely historical facts. *See*, *Abdur'Rahman v. Bell*, *supra*, 226 F.3d at 708. Petitioner has been unable to find any state court findings of purely historical fact with

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[10] The word "possibility" is used here in the same sense that "any reasonable likelihood" was used in the above-cited quote from *Kyles*, *supra*, 115 S.Ct. at 1565 n. 7.

regard to claims of prosecutorial misconduct. In any event, Petitioner seeks of this Court no factual finding that is contradictory with any state court finding of fact with regard to prosecutorial misconduct or ineffective assistance of counsel.

For the reasons set out above, this court is free to conduct a *de novo* review of the law of ineffective assistance of counsel and prosecutorial misconduct as applied to the facts presented to this court in support of those claims.

IV. Petitioner's Properly Presented and Exhausted Claims of Prosecutorial Misconduct

As this Court previously found, this is a case where "abundant" and "compelling" evidence was never investigated by Petitioner's trial counsel and therefore never presented to the jury. But when all of Petitioner's claims are viewed cumulatively and in context, the unfairness of the trial and the unreliability of the outcome are even more appalling. The instances of prosecutorial misconduct in this case, when considered in their totality, establish more than just the withholding of significant and compelling evidence, and even more than individual instances of intentional prosecutorial deception. They establish a deliberate pattern and scheme of prosecutorial fraud from indictment to sentencing, with regard to both the 1986 offense for which Petitioner was tried in this case and the prior 1972 offense which served as the most important aggravator relied upon by the prosecution in seeking the death penalty. As explained below, this persistent and deceptive scheme of prosecutorial misconduct did more than to keep the jury from hearing all the evidence; the ultimate effect was to portray an entirely false and misleading picture of every important aspect of this case.

A. The Context of the Prosecutorial Misconduct in this Case.

The prosecutorial misconduct in this case was perpetrated primarily by Assistant District Attorney John Zimmermann, a prosecutor with a long history of engaging in various forms of

misconduct and deceptive practices.[11]

Zimmermann knew that obtaining a death sentence in this case would be problematic. He testified before this Court that in any capital case the prosecution must "explain everything to the jury." (FT 905). Zimmermann also perceived that in Davidson County, at least, capital jurors must be convinced "not beyond a reasonable doubt, but beyond a shadow of a doubt" if they are to impose a sentence of death. (FT 905-908).

Further, Zimmermann knew that this case presented its own specific problems that would make it particularly difficult to obtain a death sentence. In a memo to Assistant District Attorney Eddie Barnard (FEx. 42), and in his testimony in this Court (FT 908-09, 912-13), Zimmermann specifically identified some of the weaknesses in the prosecution's case, such as the following: (i) no one other than co-defendant Devalle Miller could identify Petitioner as the assailant; (ii) because only Miller could identify Petitioner as the assailant, it would be necessary to cut a deal with Miller in exchange for his testimony;[12] and, (iii) although "photographs of the decedent's house show blood spattering all over the kitchen ... [if Petitioner] did wear his coat the entire time he obviously was not present when the stabbing occurred." (FEx 42 at Bates stamp pp. 000677-8).[13]

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[11] Attached hereto as Appendix D is a memorandum describing instances in which courts in other cases have reprimanded Zimmermann for engaging in many of the same kinds of prosecutorial misconduct that occurred in Petitioner's case.

[12] It should be noted that pursuant to the recently issued policy of the Davidson County District Attorney General, "The death penalty will not be sought in cases where the evidence consists of the uncorroborated testimony of a single eyewitness or of a cooperating codefendant or accomplice." *See, Office of the District Attorney General, 20th Judicial District, Death Penalty Guidelines*, ¶ 9 (attached as Appendix C hereto) (emphasis added).

[13] *See, also*, Evidence That Petitioner Was Not The Assailant, Appendix E hereto.

Zimmermann acknowledged in his memo that, "The case is not open and shut on the issue of guilt." (*Id.* at p. 000681). In this same memo and in other documents in his file, Zimmermann also was aware that Petitioner had potential mental state defenses that could be raised at both the guilt and sentencing stages of the case. (*Id.* at 000678-81).

Because of these and other problems with the case, Zimmermann violated his ethical and legal obligations to present the truth. He withheld key information and he invented his own facts to suit what he considered to be a winning theory for the prosecution.

B. The Types of Prosecutorial Misconduct in this Case.

The properly exhausted and presented prosecutorial misconduct claims in this case can be divided into four general categories: (i) pretrial misrepresentations; (ii) *Brady* violations; (iii) improper manipulation of key witness testimony; and (iv) deceptive presentation of inadmissible evidence.

(i) Pretrial Misrepresentations.

(a) MTMHI Letter. (Claim D.2.(2))

The first set of prosecutorial pretrial misrepresentations can be found in Zimmermann's February 10, 1987 letter to Middle Tennessee Mental Health Institute ("MTMHI") in connection with its psychological evaluation of Petitioner. (FEx. 34). At the time, Petitioner was not being represented by any attorney: his first attorney, Neal McAlpin, had effectively withdrawn from the case and his trial attorney, Lionel Barrett, had deliberately refrained from working on the case while awaiting the $10,000 balance of the promised retainer which he never received. (FT 694-5). Zimmermann's letter, therefore, was MTMHI's only outside source of information about Petitioner's prior criminal history and the circumstances surrounding the offense, and it was filled with fabrications.

First, with regard to the Petitioner's prior murder

conviction, the letter states:

> During those proceedings, and according to Court records, the defendant, through his counsel, moved the Court for a competency hearing and psychiatric evaluation as to his sanity. After those examinations were concluded the Court ruled that the defendant was competent and the Court directed the defendant to proceed to trial. There appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial.

(FEx. 34, p. 3). This was a deliberate falsehood. According to the transcript of the 1972 trial, which was in the prosecution's file, the Petitioner did rely on the insanity defense. (FEx. 131). Indeed, as reflected in this transcript, at the 1972 trial Petitioner presented expert psychiatric testimony that he was insane, and the government's own psychiatric expert conceded that he could not be sure that Petitioner was able to control his behavior at the time of that offense.[14] Even Zimmermann's internal memorandum to Assistant District Attorney Eddie Bernard referred to the fact that Petitioner raised an insanity defense at his 1972 trial. (FEx. 42 at Bates stamp p.000679).

Second, the letter states that Petitioner "was not associated with [] particular religious organization." (*Id.* at p. 3). That was not true, for Petitioner was associated with the Southeaster Gospel Ministry (the "SGM"), a religiously oriented organization. It is not clear what Zimmermann knew about the SGM at the time he wrote the letter, but there is

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[14] Under the Tennessee definition of insanity at the time, the testimony given by both psychiatrists in Petitioner's 1972 trial would have supported an insanity defense. *See Graham v. State*, 547 S.W.2d 531 (Tenn. 1977) (Tennessee definition of insanity); *State v. Clayton*, 656 S.W.2d 344, 346 (Tenn. 1983) (burden of proof is on the state to prove sanity beyond a reasonable doubt).

nothing in the prosecution's file that would support this statement. Zimmermann ultimately learned from Devalle Miller about the involvement of the SGM, but he never gave any of that information to the defense or MTMHI. (P-CT, Vol. III, pp. 13-43, discussed below).

Third, the letter states: "The police theorize that the defendant was relatively new to Nashville and making attempts to become entrenched as a drug distributor in Nashville;" and "Essentially, the victim in this case was wholesaling the Marijuana and that is the position the defendant wanted to assume." (*Id.* at 3-4). Such a theory was pure invention. It is not reflected in the police files. It is patently false and the State can point to no evidence that might support the theory.

Fourth, the letter states, "The victim in this case distributed marijuana from his home but did not distribute Cocaine." (*Id.* at 3). In fact, Daniels did distribute cocaine as reflected by the information obtained by the prosecution from the victim's brother. (FEx. 57). *See also* the police report describing "white powder" in one of the bathrooms (FEx. 3), the police report identifying a hypo syringe cap taken from Norma Norman (FEx. 4), and the autopsy report indicating that cocaine was found in the victim's urine (FEx. 14). (As discussed below, these police reports were never turned over to the defense.)

Fifth, the letter states, "The defendant had taken on the name of Scarface in the local drug community and that is all many of the people knew him by." (*Id.* at 4). If in fact the police ever thought that the Petitioner had been called Scarface, there is no reference in the prosecution's file, the police file, or any other known place, indicating that the Petitioner had assumed that name in the "drug community" or that that was the only name by which some people knew him.

Sixth, the letter states:

> He [the Petitioner] had advised the police and his attorney that the man he murdered in prison was a homosexual and that he murdered him in self-

> defense to prevent being raped. Further checking of court records reflect that the defendant was a leader of a prison gang attempting to gain control over the victim's gang and that the murder was a cold blooded premeditated murder, which reflects why the Federal judge gave the defendant the maximum punishment of life imprisonment when he could have sentenced the defendant to as little as ten (10) years for Murder in the Second Degree.

This, perhaps the most damaging of Zimmermann's statements to MTMHI, is a deliberate falsehood in several respects and, like Zimmermann's drug distribution theory mentioned above, is pure invention. The 1972 court records in fact confirm the Petitioner's claim that the 1972 murder was provoked by homosexual assaults on him. (FEx. 49 [Lowe's letter to Zimmermann], 131, 136 [Bishop deposition], and 142). There is no reference in the court records or federal prison records to any "prison gang." (*See* Bishop Deposition, FEx. 136). The term "gang" was Zimmermann's own creation out of thin air. (*See* Zimmermann's testimony, FT 1018-9). There was no evidence or testimony in the 1972 trial that the prior murder was a "cold blooded premeditated murder." In fact, both the prosecution psychiatrist and the defense psychiatrist who testified in that trial agreed that the killing was likely the result of a loss of control on the Petitioner's part. Finally, this statement fails to mention that the 1972 trial judge recommended in his final judgment that Petitioner be committed to an institution where he may receive psychiatric treatment. (FEx. 131).

While Zimmermann presented his false theories in his letter to MTMHI, he never furnished MTMHI (or the defense) with actual relevant information sitting in his file. For example, Zimmermann never informed MTMHI that shortly after the Petitioner's arrest and within forty-eight hours of the offense, Petitioner banged his head against the wall and the floor and

was placed in a padded cell for two days. (FEx. 7, 8). Zimmermann also never furnished MTMHI with any of the records pertaining to Petitioner's 1972 prior murder conviction, where Petitioner presented a viable insanity defense, or Petitioner's 1970 prior assault conviction, which included a motion of the prosecution for a psychological evaluation prompted in part by the Petitioner's headbanging. (FEx. 49, 131).

Zimmermann's statements to MTMHI go beyond zealous advocacy. They step over the line into pure fraud and deception. These statements were of significance in MTMHI's evaluation of the Petitioner. As Dr. Craddock testified, MTMHI had virtually none of the Petitioner's prior institutional records, and MTMHI relied entirely upon Zimmermann's letter for information regarding the circumstances surrounding the offense. (FT 105-6, 109, 151-2).

(b) <u>Misrepresentations About Prior 1972 Murder</u>. (Claim D.3)

Zimmermann defrauded Mr. Barrett regarding Petitioner's prior 1972 murder conviction. Zimmermann falsely told Barrett that the 1972 murder was not a response to homosexual rape, as Petitioner claimed (and as was the case), but rather was part of a "turf war in the prison between the two gangs as to who would control the drug trade in the prison." (P-CT, Vol. III, p 169, FEx. 130). In the post-conviction proceeding, Zimmermann explained his strategy:

> "My purpose on that was to hopefully keep from getting into this 1972 murder, and if Mr. Barrett could see what we had and understand what kind of potential rebuttal evidence that it would confine the defendant's testimony since I'd already provided to him the documentary evidence as part of discovery. I wasn't concerned about a discovery violation. But it was basically a tactic that I've learned that in cases like this if you have evidence that is a little bit questionable,

> that could raise an appellate issue if it's introduced-"

(P-CT, Vol. III, p. 170, FEx. 130).[15]

In fact, contrary to Zimmermann's testimony in the post-conviction hearing, he had not provided Mr. Barrett with "the documentary evidence as part of discovery." Zimmermann had not provided Mr. Barrett with either the 1972 trial transcript or the letter Zimmermann had received from Magistrate David Lowe, the attorney who prosecuted the 1972 case. (FEx. 45). This documentary evidence, which should have been turned over under *Brady*, supported Petitioner's version of the circumstances surrounding the 1972 murder, and it contradicted Zimmermann's statement that the murder was part of a "turf war" between "gangs" over the "drug trade" in the prison. None of the evidence mentioned either a turf war, gangs, or drugs. Instead, all of the documentary and testimonial evidence confirmed that the 1972 murder was related to homosexual attacks on the Petitioner.

Zimmermann attempted to justify his false statements to Mr. Barrett regarding the 1972 killing by claiming that he received his information from Mr. Delagrange, the F.B.I. agent Zimmermann brought to the Petitioner's trial. (FT 976-7). There are at least four problems with Zimmermann's attempted justification.

First, Zimmermann developed his theory about the 1972 killing, that it was part of a gang war over the drugs in the prison, before he ever talked to Delagrange. As mentioned above, Zimmermann set out this fabricated theory in his February 10, 1987, letter to MTMHI. (FEx. 34). It appears from the records in this case and Mr. Delagrange's testimony,

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[15] Zimmermann called himself to the stand over the objection of Petitioner's state post-conviction counsel. The Court overruled the objection and permitted Zimmermann to testify even though he was an attorney representing the State at the hearing and he had given no prior notice that he intended to testify.

however, that Zimmermann did not talk to Mr. Delagrange until after June 4, 1987. (*See* FEx. 61, 66, 70, and Delagrange's Depos., FEx. 136, at p. 21).

In this connection, it should be pointed out that according to correspondence in the prosecution's file, Zimmermann was attempting to portray the 1972 killing as a drug-related event before he ever talked to Delagrange. In his March 30, 1987 letter to David Lowe, Zimmermann said:

> I find it very difficult to believe that a Federal Judge would sentence an inmate to a life sentence in what purports to be nothing more than a defensive killing. Particularly when the circumstances underlying the killing involve a sexual attack upon the defendant. Therefore, it is imperative that we obtain information regarding the facts of this case and be prepared to offer them during the penalty phase of the trial.

(FEx. 45). In his April 10, 1987, letter to U.S. Attorney Henry Hudson, seeking permission to talk to David Lowe about the case, Zimmermann wrote:

> I am also interested in the fact that the previous Murder for which the defendant received a life sentence may pattern somewhat the manner in which the present case occurred.

(FEx. 48).

From this correspondence and the other circumstances involved in this matter, it is clear that Zimmermann was actively pursuing information about the 1972 murder that would fit his fabricated theory that Petitioner was involved in "drug turf" wars. It is therefore clear that Zimmermann's false statements to Mr. Barrett about the 1972 murder were not the product of mere mistake on Zimmermann's part.

Second, Zimmermann gave this story to Mr. Barrett before the trial, and therefore before he brought Delagrange to Nashville. (Barrett testimony, FT 294-5).

Third, Delagrange had no knowledge of drugs or "gangs" in the prison. He therefore had no basis whatsoever for affirming the theory Zimmermann was advancing to Mr. Barrett. (*See* Delagrange's Depos., FEx. 136, at pp. 17-20). After Zimmermann made his first contact with Mr. Delagrange, he interviewed Mr. Delagrange maybe two or three times over the telephone and again after Mr. Delagrange came to Nashville. Zimmermann, therefore, had the opportunity to find out from Mr. Delagrange what his knowledge was and the basis of his knowledge. (Delagrange Depos., FEx. 136, at p. 34). It must be presumed that when Zimmermann introduced Mr. Delagrange to Mr. Barrett, which occurred in the hall of the courthouse in the middle of trial, Zimmermann was aware that Mr. Delagrange did not have the knowledge that Zimmermann represented to Mr. Barrett.

Fourth, there can be no satisfactory reason or explanation for Zimmermann's deceptive strategy in light of the fact that Zimmermann possessed documentation that contradicted the story he was conveying to the defense.

Mr. Barrett relied upon Zimmermann's misrepresentations about the circumstances of the 1972 murder. (FT 299). Although Mr. Barrett would not use the word "deceived," he testified in this proceeding that he was certainly "misled" by Zimmermann "as to the strength of any potential testimony my client might give along those lines." (FT 308).

(ii) Brady Violations.

(a) 1972 Transcript. (Claim D.1.(1))

This Court has held that the prosecution's failure to turn over the 1972 transcript of Petitioner's prior murder trial constituted a *Brady* violation but that, "standing alone," this violation was not material and was therefore not grounds for relief. 999 F. Supp. at 1089-90. However, when viewed in the context of the other instances of prosecutorial misconduct, together with the ineffective assistance of defense counsel, this *Brady* violation takes on greater significance.

The prosecution was put on notice that the Petitioner's mental health might be an issue in the case. In response to Mr. McAlpin's motion. (FEx. 22), the trial court ordered the Petitioner's evaluation at MTMHI. (FEx. 28). On March 24, 1987, Mr. Barrett wrote Zimmermann and explained that he was "going to seriously look at my client's mental condition...." (FEx. 41). Zimmermann acknowledged receipt of this letter and the possibility that Mr. Barrett might raise an insanity defense. (FEx. 46). On July 1, 1987, Mr. Barrett wrote to Zimmermann stating that the defense might offer "some proof as to Mr. Jones' psychiatric status...." (FEx. 72).

The prosecution was aware of the possibility of mental state defenses from other sources as well. In his internal memo to Assistant District Attorney Eddie Barnard, "Team Leader," dated March 24, 1987 (FEx.42), Zimmermann made such statements as: "The defendant is just plain weird" (Bates stamp p. 000678); "I have received a copy of a transcript of the defendant's first trial where he plead not guilty by reason of insanity" (Bates stamp p. 000679); and "The *Scarface* element will undoubtedly have to be dealt with in some way so that the jury doesn't think the guy is plain wacko" (Bates stamp p. 000681).

Notwithstanding all of this, the prosecution deliberately withheld and actively concealed exculpatory information relating to the Petitioner's mental state, including the 1972 transcript.

As indicated in his internal memo to Eddie Barnard (FEx. 42), at least as early as March 24, 1987, Zimmermann had the 1972 transcript in his file. (FEx. 131). This transcript indicated that Dr. A.M. Masri, a psychiatrist, examined the Petitioner and testified for the defense, concluding that he "is basically a schizoid human being.... [W]e consider this an illness.... [H]e is a sick man." (FEx. 131, Bates stamp 767). Dr. Masri testified that the Petitioner was mentally ill and that as a result of this mental illness, he was unable to control himself under times of stress. On cross examination, based in

part on testing conducted on the Petitioner, Dr. Masri testified that the Petitioner had a mental disease which consisted of "delusional thinking and paranoid and schizoid personality and inability to withstand pressure and have [sic] no control." (FEx. 131, Bates stamp 771). Dr. Masri, as did Drs. Sadoff and McCoy before this Court, concluded that the Petitioner suffered from "borderline personality with periodic decompensation with loss of control, of ego control." (FEx. 131, Bates stamp p. 773). Even the psychiatrist who testified for the prosecution in the 1972 case, Dr. Robert J. Eardley, testified that the Petitioner lost control under the stress of the moment and, when asked if the Petitioner had been temporarily insane at the time, testified that he did not know. (*See* FEx 131, Bates stamp p. 781). The record of the 1972 case clearly indicates that Petitioner's mental state is, at the least, an exculpatory subject of relevant inquiry and consideration.

Zimmermann could give no satisfactory explanation for his failure to turn over the 1972 transcript. (FT 1014-7). Basically, all that Zimmermann could say was, "I didn't see the two as proving -- as what happened in '72 as proving what happened in '86. That was just my interpretation." (FT 1017).[16] To be exculpatory, however, evidence does not have to "prove" what happened at the time of the offense. It is improper for the prosecutor to make his own judgment as to the force of the evidence in determining whether he must turn it over to the defense. Zimmermann found that the 1972

[16] Zimmermann's attempted explanation for failing to turn over the 1972 transcript is strikingly similar to the explanation he gave in *Garrett v. State*, 2001 Tenn.Crim.App.LEXIS 206 (2001), for his decision to withhold exculpatory evidence in that case. In *Garrett*, the Tennessee Court of Criminal Appeals reversed a first degree murder conviction based upon Zimmermann's deceit. The Court said, "This Court is extremely troubled with General Zimmerman's decision to himself determine the reliability of the evidence and to refuse to turn [it] over," and further found that Zimmermann had "intentionally withheld" information and had misled the defense. *See Appendix D*, pp. 3-4, hereto.

transcript was significant enough to make reference to it in his memo to Eddie Barnard where he evaluated the strengths and weaknesses of their case against the Petitioner. (FEx. 42, Bates stamp p. 000679). This was clearly exculpatory information, and there is no valid excuse or reason for the prosecution's decision to withhold this transcript from the defense.

The prosecution's decision to withhold the 1972 transcript radically altered the course of the case. Mr. Barrett gave the following testimony in this proceeding:

> Q. If you had had the transcript of the 1972 trial and you had been aware in the 1972 trial James Jones had raised an insanity defense and you had been aware even the prosecution's expert witness said he may have lost control at the time of the incident, would you have handled this case differently?
>
> A. I very well might have. You have to break down as to the guilt or innocence phase and the sentencing phase.
>
> Certainly this information would have some bearing on both the guilt or innocence phase and the sentencing phase.
>
> I believe that had I had this information that I would have certainly taken a much closer look at any potential psychiatric defense that might be available to Mr. Jones both at the guilt and innocence phase and certainly as mitigation at the sentencing phase.
>
> Q. Would you have gone to the judge for money for psychiatric services?
>
> A. Based upon what I see here, I believe I would have, sir, yes.

(FT 309).

Zimmermann's decision to withhold the 1972 transcript is made more egregious by the fact that Zimmermann had in his file a letter dated April 15, 1987 which he received from Magistrate David G. Lowe, the person who was the prosecuting

attorney in the Petitioner's 1972 case. (FEx. 49). This letter was in response to Zimmermann's request for information about the 1972 prior murder conviction. This letter stated that the 1972 killing was a response to homosexual attacks on the Petitioner. This information would have corroborated the Petitioner's version of what happened in 1972; it would have mitigated the effect of the prior murder conviction; and if it had been disclosed to the defense, it likely would have kept Zimmermann from making misrepresentations to Mr. Barrett about the 1972 case, as discussed above.

The information Zimmermann possessed about the 1972 case was significant for two reasons: it mitigated the effect of the prior murder conviction, which the prosecution used as an aggravator supporting their request for the death sentence; and, it established the existence of Petitioner's mental illnesses and emotional instability and the likelihood of the existence of viable mental state defenses to the 1986 offense. Zimmermann's decision to withhold this information from the defense (and from MTMHI) can be explained in only one way, especially when viewed in the context of the other instances of prosecutorial misconduct: this was part of his successful scheme to fraudulently mislead first the defense lawyers, MTMHI, and then the court and jury about the nature of the 1972 case and about Petitioner's mental condition and character.

(b) <u>Police Reports On Petitioner's Condition at Time of Arrest</u>. (Claim D.1.(6))

The prosecution also withheld important information about Petitioner's mental state at the time of his arrest less than forty-eight (48) hours after the offense. Detective Garafola had prepared a police report that described the Petitioner at the police station upon Petitioner's arrest in the afternoon of February 19, 1986. (FEx 7). This report described the Petitioner as crying and went on to say:

> "He then started to hit his head on the table and then he jumped up still handcuffed to the chair

> and banged his head up against the wall. We got him under control and then took him to the booking room. In the booking room he started to bang his head on the wall again. Det. Elmore was able to control him."

This report was not turned over to the defense as *Brady* material prior to trial. When the report was turned over to the defense as *Jencks* material in connection with Detective Garafola's testimony, this portion of the report was redacted.

Second, there was an Incident Report regarding an incident that took place at 21:40 (9:40 p.m). on February 19, 1986, just hours after the arrest. This report stated that the Petitioner again started "beating his head against the floor," and that he was taken to a padded cell with instructions to an officer to check on him every half hour. The next Incident Report indicates that the Petitioner was not taken from the padded cell until two days later, on February 21, 1986, at 3:15 p.m. (FEx. 8). This collection of documents also was not turned over to the defense either before or during the trial.

This was not a case of mere non-disclosure. By redacting the first report of head banging, the prosecution actively concealed this information from the defense. This was important information. According to the testimony in this case by Dr. Craddock of MTMHI, the State's mental health expert, headbanging is an "extremely unusual behavior" for adults with normal intelligence, (FT 125), and this kind of self-mutilating behavior is a possible sign of mental health problems such as Borderline Personality Disorder. (FT 130-2).

By deciding to withhold this information, the prosecution created for themselves the opportunity to falsely argue to the jury that Petitioner showed no emotion, was neither mentally ill nor emotionally unstable, but instead was just a depraved murderer who committed the act out of pure pleasure and enjoyment. If this information had been disclosed, the prosecution would not have been in a position to make these kinds of false and misleading arguments with any effect.

(c) Transcript of Miller's First Statement to Police. (Claim D.1.(4))

The prosecution also failed to turn over to the defense prior to trial, as Brady material, the transcript of the April 23, 1987 tape recorded interview conducted by the prosecution of the co-defendant Devalle Miller. (FEx. 51). This transcript contains descriptions by Miller of the Petitioner that suggest a possible mental state defense.[17] For example, Devalle Miller gave the following descriptions in his statement:

> "... and I was standing there and its like James went from day to night." (Bates stamp p. 000166).
>
> "...he was babbling on and on and on..." (Bates stamp p. 000167).
>
> "... because I was riding a uh uh to what I perceived as a maniac." (Bates stamp p. 171).
>
> "I really didn't want him in my house for the simple fact I didn't know if he was going to turn himself on back in my house with me and my family ..." (Bates stamp p. 000173).

The prosecutors themselves explicitly acknowledged that Devalle Miller's statements might raise a question about the Petitioner's mental health. In the margin of the transcript next to Miller's statement about how he perceived the Petitioner as a "maniac" (Bates stamp p. 000171), ADA Eddie Barnard had handwritten the comment: "Insanity + mitigating factor."

Although the prosecution did turn over this transcript as Jencks material during the course of the trial, that did not satisfy the prosecution's obligation under *Brady*. Exculpatory information about a defendant's mental state must be turned over sufficiently in advance of the trial to enable the defense to

[17] This transcript was exculpatory for two reasons: (i) as discussed in this part of this Brief, it contained exculpatory information relevant to the Petitioner's mental state; and (ii) as explained below, it contained statements that contradicted Devalle Miller's trial testimony.

consider the defendant's potential guilt and sentencing stage defenses, to take steps to obtain a professional evaluation, and to prepare the case for trial.

(d) Miller's Statements to Prosecution about the SGM. (Claim D.1.(3))

As discussed below, the prosecution spent hours with Miller preparing him to testify. From the testimony given by Miller in Miller's own sentencing hearing (FEx. 93) and in Petitioner's state post-conviction hearing (P-CT, Vol. III, pp. 13-43), it is now apparent that Miller gave the prosecution at least the following information concerning the SGM and its involvement in the offense:

- that Miller and Petitioner joined the SGM, a racial identity religious organization devoted to bettering the Black community (P-CT, Vol. III, at 15);
- that Miller and Petitioner were "brainwashed" by the organization (*id.* at 37);
- that there was a paramilitary group within the SGM that consisted of Allen Boyd, William Beard, Miller and Petitioner (*Id.* at 15);
- that Miller and Petitioner went to Daniels' apartment on the evening of the offense as part of an SGM mission to intimidate Daniels into ceasing his drug selling activities, which was part of the SGM's larger mission to rid the community of drug dealing (*Id.* at 19);
- that William Beard gave Miller a pistol to be used in "operations to clean up the Black neighborhoods (*Id.* at 16);

- that Petitioner told Miller that he, Petitioner, got his shotgun from Allen Boyd (*Id.* at 17);[18]
- that on the night of the killing, after leaving Daniels' house, Miller and Petitioner went to Miller's apartment and Petitioner made a telephone call from a booth; and Allen Boyd showed up a short time later (*Id.* at 26);
- that after leaving the victims' apartment, Miller heard Boyd say something to the effect of "just be cool and go back to work." (*Id.* at 28);
- that after Petitioner's arrest, Miller went to Beard who gave him getaway money (*Id.* at 29-31);
- that Miller intentionally misled Beard as to where he was going because he feared that Beard, Boyd and the SGM might kill him; Miller also told others while on the run that he was fearful of Boyd, Beard and Mitchell Hollie, all of the SGM (*Id.* at 31, 36-7); and
- that members of the SGM provided Miller's wife, Karen, with financial assistance while Miller was on the run. (*Id.* at 35-6).

Miller confirmed in his post-conviction testimony that he related all of this information to Zimmermann; and Zimmermann never disputed this either during his very brief cross-examination of Miller or elsewhere. (*Id.* at 33

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[18] The fact that Petitioner obtained his gun from Boyd was verified from the F.B.I. gun trace introduced into evidence in this proceeding. *See Motion to Expand Record* and *Order* entered April 8, 1998 (Docket Nos. 202, 204).

By deciding to withhold this *Brady* information from the defense, the prosecution created for themselves the opportunity to falsely portray Petitioner as the sole planner and decision-maker relating to the events surrounding the offense, and to "debunk" any effort by Petitioner to mention the SGM during his sentencing hearing.

(e) <u>Lab Reports about Blood Evidence</u>. (Claim D.1.(7))

This Court previously considered the merits of Petitioner's *Brady* claim relating to the T.B.I. lab report which found that no blood was found on clothing seized from petitioner's apartment, including Petitioner's long dark wool coat. This Court rejected this *Brady* claim on the ground that the lab report had been provided to Petitioner's first counsel, Mr. Neal McAlpin and had been filed with the trial court. 999 F.Supp. at 1090.

Although this Court has rejected this *Brady* claim, Zimmermann's conduct around the blood evidence was deceptive and further evidences both the prosecution's persistent and deliberate scheme to deceive and the prejudicial effect of that scheme, especially when viewed cumulatively with the ineffective assistance of Petitioner's trial counsel.[19]

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[19] This Court found that trial defense counsel had an opportunity to know about the blood evidence and to present it to the jury, and that it was not the prosecutor's fault that the evidence was not presented to the jury. *See*, 999 F.Supp. at 1090. It is surely one or the other. If this failure was the fault of the defense attorney, and not the prosecutor, this Court should grant relief due to counsel's ineffectiveness, rather than prosecutorial misconduct. The materiality and the prejudice resulting from the jury's inability to consider the blood evidence is obvious. *See*, Juror Affidavits, being filed contemporaneously herewith. The resulting prejudice accrues to Petitioner with regard to the jury's verdict of guilt and its verdict at the sentencing stage of a sentence of death. *See*, Evidence That Petitioner Was Not The Assailant, <u>Appendix E</u>. As the Court observed in *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995):

Zimmermann was fully aware of the significance of the lab report. In his internal memo to Assistant District Attorney Eddie Barnard, Zimmermann identified the lab report as a "weakness in [the] case" as follows:

> T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by Jones. Photographs of the decedent's house show blood spattering all over the kitchen....[I]f the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred. Also, the police seized a pair of work pants during the search of the defendant's apartment which had red spots all over it which was found not to contain any human blood stain. The red particles on the defendant's pants came from red dye used at the publishing Board where the defendant worked.

> Mr. Banks has framed his *Brady* and ineffective assistance arguments before this court in the alternative. He argues that the State withheld exculpatory evidence in violation of *Brady*. Alternatively, he argues that if the State did not withhold the evidence, then his trial counsel was ineffective for failing to use the evidence in his defense. Under either analysis, our final inquiry is the same: has our confidence in the outcome been undermined? *See Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068 (ineffective assistance of counsel); United States v. Agurs, *427 U.S. 97, 1094, 96 S.Ct. 2397098, 49 L.E.2d 342 (1972) Brady* violation).

54 F.3d at 1515, n. 14. Likewise, Petitioner "framed his *Brady* and ineffective assistance arguments in the alternative" on the issue concerning the blood evidence from the state laboratory and its significance on the question of the identity of the assailant. *See*, Amended Petition, ¶¶ D.(1)(7) (prosecutorial misconduct); and, A.(1) and (2); E.(2)(a) and (e) (ineffective assistance of counsel).

(FEx 42 at Bates stamp p. 677). The police reports describing the crime scene, which were never turned over to the defense, also described the extensive blood splattering.

This "weakness" in the prosecution's case was confirmed by the evidence introduced before this Court. Zimmermann testified, "I think when you have a murder with this much splatter, you would think some would have gotten on the defendant, yes." (FT 917). Dr. Kris Sperry, the Medical Examiner for the State of Georgia, also testified before this Court that, based on his review of the autopsy report, the T.B.I. file, and the blood evidence, the assailant would have had blood stains on his clothes. Dr. Sperry also testified that the blood stains would not have been removed by cleaning or washing and would have been detected by the tests employed by the T.B.I.. (FT 38-61).

Although the prosecution may have provided the T.B.I. lab report to Mr. McAlpin, Petitioner's original counsel, Zimmermann deceptively managed to keep the lab report out of Mr. Barrett's view. Prior to the trial Mr. Barrett filed with the court and served on the prosecutor a request for all exculpatory information. (FEx 63). The prosecution responded to this request by turning over to Mr. Barrett the results of the comparison tests of Petitioner's clothing to crime scene soil samples (FEx 62), which were of no exculpatory significance because Petitioner had always conceded that he was at the crime scene. But Zimmermann withheld the T.B.I. lab report. Further, in a letter from Zimmermann to Mr. Barrett dated March 30, 1987, in response to Mr. Barrett's "form discovery request," Zimmermann responded only to a specific *Brady* request for the identity of "other subjects or suspects that may be involved." (FEx 41, 46). Again, Zimmermann never notified Mr. Barrett about the exculpatory blood evidence. Whether or not these actions amount to a specific *Brady* violation, Zimmermann's conduct through this period prior to trial was not forthright and certainly was inconsistent with the prosecutor's duty to seek justice.

Zimmermann's ploy worked. Barrett never became aware of the T.B.I. lab report and therefore never raised any question at trial about the blood evidence.

As a consequence, Zimmermann was free to falsely use Petitioner's long dark wool coat at trial to help satisfy his need to identify Petitioner as the assailant, even though this coat tested negative for blood. Both of the prosecution's key witnesses at the trial testified that Petitioner was wearing his long black wool coat throughout the time period when the offense occurred. The prosecution introduced the coat into evidence during Norma Norman's testimony. (T 1333, trial exhibit 12). On at least five separate occasions during her testimony, she described Petitioner as wearing the "long black coat." (T 1332, 1334, 1343, 1364, 1366-7). The co-defendant Devalle Miller, on at least two separate occasions during his testimony, described Petitioner as wearing the coat during the time of the offense, and he too identified trial exhibit 12 as the coat Petitioner was wearing. (T 1451, 1454-5). During the guilt stage closing argument, the prosecution displayed the coat to the jury, repeatedly describing it as the "gangster coat" that Petitioner wore at the time of the offense. (T 1672-3). Significantly, although the prosecution was aware of the weakness in their case from the lack of blood stains on the coat, and although as explained below they spent long hours on several occasions preparing (manipulating) Miller for his testimony, no one ever indicated that Petitioner ever took the coat off at any time while the offense

occurred.[20]

(f) <u>Other Police Reports.</u> (Claim D.1.(8))

Several other police reports were not turned over to the defense even though they contained exculpatory information. (FEx. 1-8, 9). Among other things, these police reports indicate that: blood was splattered on the walls of Daniels' apartment, which is exculpatory information relating to the question whether Petitioner actually performed the stabbings; "The chest of drawers in [the master bedroom] had not been opened. It did not appear that the room had been searched by anyone," which is exculpatory information relating to the question of whether Petitioner took the $300, which Norman had testified was taken from that location; and that when the first officers arrived at the scene, there were a number of people who had already been in the apartment, which is exculpatory evidence raising a question about whether, if $300 was stolen, Petitioner was the one who took the money. (*See* discussion below on the prosecution's manipulation of Norman's testimony on this point.)

(iii) <u>Altering Testimony</u>.

(a) <u>Miller's Testimony</u>. (Claim D.2.(1))

There were clear and obvious inconsistencies between Miller's April 23 statement (FEx. 51) and Miller's trial testimony. The circumstances of this case demonstrate that the prosecution improperly manipulated Miller's testimony to

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[20] The failure to present the blood evidence was prejudicial to Petitioner at both the guilt and sentencing stages. At guilt, it would have raised at least reasonable doubt about whether Petitioner was the assailant and therefore whether he was guilty of premeditated murder. (For a further explanation of Petitioner's guilt stage defense based on the blood evidence, see <u>Appendix E</u> hereto). For the same reasons, at sentencing it would have raised at least "residual doubt" about whether he was the assailant, which is a mitigating factor to be considered by the jury. *State v. Teague*, 897 S.W.2d 248, 256 (Tenn. 1995); *State v. Hartman*, 42 S.W.3d 44 (Tenn. 2001). The jury affidavits in this case demonstrate that the blood evidence is a powerful mitigating factor.

conform to the false picture the prosecution presented to the jury.

Brady requires the prosecution to disclose information that could be used to impeach the credibility of the prosecution's witness. In this case, the prosecution violated *Brady* by failing to disclose to the defense, prior to trial, the fact that Devalle Miller changed his story to the prosecution, and that his trial testimony would contradict in many material respects the statements he previously gave to the prosecution.

It goes without saying that in a case of this sort, the credibility of a co-defendant's testimony will be suspect. As Zimmermann said, "[W]hen you have co-defendants they always want to point the finger at each other." (FT 912).

Because of the problems with the blood evidence and the lack of other evidence that might establish the Petitioner as the assailant, the prosecution realized that Miller was a crucial witness to them. The prosecution, therefore, worked on Miller intensively.

They took advantage of the one day Miller was in Tennessee unrepresented by counsel, April 23, 1987, to interview him. *See* Ross Alderman's testimony (FT 1026-30). Zimmermann testified before this Court that he would not interview somebody charged with murder if they are unrepresented by counsel unless they "execute a waiver of counsel." (FT 934). Yet, there is no indication that Miller executed a waiver of counsel when the prosecution interviewed him on that day. The following day Miller was appointed counsel when he appeared for the first time in court on the jail docket and he was represented continuously thereafter.

Subsequently, the prosecution was advised that Miller's story had changed. Miller's attorney, Ross Alderman, told Zimmermann that there were discrepancies between Miller's version of what happened as compared to the version Miller set forth in his April 23 interview. (FT 1033). The prosecution then decided to spend time with Miller. Zimmermann testified before this Court that if he had to interview a co-defendant

witness more than once or twice, it would be "because, in my opinion, I am trying to find additional evidence, other leads, things to corroborate their testimony." (FT 938). It is clear from the facts of this case, however, that Zimmermann did more with Miller than pursue additional evidence or other leads. He coached Miller to shape his testimony. (*See, e.g.*, FT 1037).

Consequently, the prosecution met with Miller to prepare his testimony. Zimmermann testified before this Court that he could "only remember one time where we had what I would call a pretrial preparation meeting." (FT 938). In fact, according to Mr. Alderman's testimony, in addition to the April 23 interview and the mid-June meeting, the prosecution also met with Miller on July 6 for 3.4 hours, July 7 for 3.5 hours, July 9 for 3.6 hours, and July 12 for 2.5 hours, for a total of 13 hours during the days immediately preceding the guilt stage of the trial where Miller testified. (FT 1034-8). Mr. Alderman testified that it seemed as if Zimmermann was spending a "long time" preparing Miller to testify. (FT 1036-7). During those meetings Zimmermann explained to Miller what other witnesses were going to say. *(Id.)* Mr. Alderman further testified in this proceeding that there were significant discrepancies between the version of the facts described by Miller in these meetings and the version he gave in his April 23 statement. *(Id.)* Also during these interviews Miller told Zimmermann about the SGM. (FT 1038-40). He described the group as a paramilitary arm of the Gospel Ministry which had a plan to drive drug dealers out of the community. (FT 1039). He identified the leaders of this group as Boyd, Beard and Hollie, and he expressed concern or fear of what others might do to him if he testified. (FT 1040). Zimmermann never disclosed before trial the fact that Miller had changed his story or any of the information Zimmermann acquired during the course of his interviews of Miller.[21]

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[21] To induce Miller to give the testimony the prosecution was looking for, the prosecution offered Miller a deal. Miller was charged along with the Petitioner with capital first degree murder, assault with intent to commit

(b) Norman's Testimony. (Claim D.2.(3))

The indictment against Petitioner included a count charging that Petitioner "did steal, take and carry away from the person and against the will of Patrick Daniels, certain personal property, to wit, approximately three hundred dollars ..." (T. 1270-1). In addition to seeking a conviction against Petitioner on this charge, the prosecution also included this charge as one of the aggravating circumstances supporting their request for the death penalty. There was, however, no evidence that anyone took any money from Patrick Daniels. At the time of trial, there was only a suggestion that money may have been stolen from Norma Norman, and not from "the person of Patrick Daniels."

To get around this problem, the prosecution determined to manipulate Norman's testimony by asking falsely misleading questions. In their trial notes, the prosecutors wrote with regard to this matter, "Items taken - $300 cash and anytime teller card (leading questions to make her say it was

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murder in the first degree with bodily injury, and armed robbery. (FEx. 44). In exchange for his testimony, the prosecution offered a plea bargain that would reduce the original three charges to the two reduced charges of second degree murder and armed robbery. (FEx. 92; Alderman testimony, FT 1041-3). Instead of a possible death sentence or life sentence, the reduced charges would carry sentences ranging from 10 to 35 years with the possibility of earlier parole. (FT 1044; FEx. 93).

The defense requested the terms of any settlement agreement between the State and any witness in return for the witness's testimony. (FEx. 42, Discovery Requests, ¶ 12). Prior to the trial the prosecution filed a RESPONSE TO MOTION FOR EXCULPATORY MATERIAL REGARDING PROMISES TO STATE'S WITNESSES, in which the prosecution purported to set forth the terms of its agreement with Miller. (FEx. 67). This Response disclosed only that the prosecution had agreed not to seek the death penalty. This Response failed to disclose that the prosecution had also agreed to a plea to reduced charges that would limit the length of any prison sentence Miller might receive. By failing to disclose all of the terms of the plea agreement that were favorable to Miller to induce his testimony, the State violated the Petitioner's due process rights under *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104.

theirs)," and "$300 and anytime teller card (leading question to say cash was theirs)." (FEx. 77)>

The leading questions by the prosecution worked, for Norman gave the desired response to the leading questions. (*See* T. 1390). Through their improper use of false leading questions, the prosecution managed to conform Norman's testimony to the indictment.

In this context, it should be further pointed out that a careful reading of Norman's testimony establishes either that the $300 never existed or, if it did, Petitioner was not the person who took it. Earlier, Norman testified that the $300 was in the chest of drawers in the bedroom. (T. 1389). She offered no testimony that Petitioner or Miller ever went into this bedroom. Her only testimony on the alleged "theft" of the money was:

Q. Was the [$300] there when they left?

A. Not that I know of.

Q. Did they take it?

A. Not that I know of.

(T. 1390). Notwithstanding this testimony, and the absence of any other proof on the subject, Zimmermann proceeded to falsely argue at closing that Petitioner "was the only one that went through the bedroom.... Ms. Norman said, he went and rummaged through the room." (T. 1669).

This represents but one more example of the ineffective assistance of Petitioner's trial counsel, Zimmermann's unethical opportunism in taking advantage of defense counsel's failings, and the resulting false picture that was presented to the jury.

(iv) Inadmissible Information to the Jury. (Claim D.6)

This claim was presented to the Tennessee Supreme Court on the direct appeal where it was held that the prosecution had, in fact, acted improperly. The Tennessee Supreme Court found that this constituted prosecutorial misconduct.

Describing Zimmermann's behavior, the Tennessee Supreme Court found:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. Defendant's parole officer, who was identified only as an employee of the U.S. District Court in Nashville, testified to introduce the fact of defendant's two prior convictions for second degree murder and assault with a deadly weapon. The State was allowed over defense objection to ask the nature of the deadly weapon. The witness answered that it was a knife. The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. The action of the State was **improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn.1990).[22]

This Court previously addressed this claim only in isolation, and not in the context of Petitioner's other prosecutorial misconduct claims together with Petitioner's ineffective assistance of counsel claims. The facts surrounding this claim, as found by the Tennessee Supreme Court, constitute further evidence of the fraudulent and deceptive practices of the prosecution in Petitioner's case; and the prejudice from this misconduct on the part of the prosecution must be cumulated with the prejudice caused by all of the other errors in this case.

C. Effect of Prosecutorial Misconduct: False Picture of the Case.

The prosecution's persistent pattern of fraud and deception combined with the ineffective assistance of defense counsel, presented the jury with a completely false picture of every aspect of this case. Among other things, the jury was given a false picture of: (i) the Petitioner as a person; (ii) the nature of the prior 1972 conviction; (iii) the circumstances surrounding the offense including Petitioner's motivation and the identity of the assailant; and (iv) Petitioner's attitude towards the offense.

In other words, this is not merely a case where the jury failed to hear everything that it should have heard. This is a case where what the jury did hear was patently false, misleading and grossly prejudicial.

(i) False Picture of the Petitioner as a Person.

The effect of obfuscating the blood evidence, misrepresenting to MTMHI and defense counsel the

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[22] In the direct appeal, of course, this was the only prosecutorial misconduct claim presented to the Tennessee Supreme Court. This misconduct obviously represents only a fraction of the total body of prosecutorial misconduct that was later discovered during collateral litigation.

circumstances surrounding Petitioner's prior murder conviction, and withholding evidence on these matters, was to paint a false and misleading picture of Petitioner as a person.

The defense was oblivious to the fact that Petitioner's coat tested negative for blood stains and to the significance of any of the blood evidence in the case (especially in light of the withheld police reports describing the extent of blood splattering at the scene of the offense). The prosecution took advantage of defense counsel's oblivion by using the coat to graphically mischaracterize Petitioner as merely a drug stealing "gangster." Throughout the trial the prosecution relied upon the coat as the item of clothing Petitioner wore during the offense and referred to it as the "gangster coat."

In the trial, the prosecution introduced Petitioner's coat as Exhibit 12 (T. 1333) and elicited the following testimony from Norma Norman:

A. ...Mr. Jones had on this **long black coat**,...

(T. 1332).

Q. Anything about that coat cause you any concern?

A. First thing I thought, it was a **gangster coat**.

Q. A **gangster coat**?

A. Yes.

(T. 1334).

A. And Mr. Jones walks in [to the apartment] and he had on this **long black coat**.

Q. Same coat that you described for the ladies and gentlemen of the jury?

A. Right."

(T. 1343).

The prosecution then referred to the "gangster coat" in their guilt stage closing argument:

> He had a **gangster coat** on, is what she called it – a **gangster coat**. And she noticed that. Now, I don't know what she saw (**indicating exhibit**), and she remembered it. **And he wore it that night**.

(T. 1672-3).

> Listen to this, ladies and gentlemen, the man, the next night, when he goes over there and he says we're going to stab these people, he goes by his house, and what does he do, he changes into his **gangster uniform**.

(T. 1673).

If the blood evidence had been disclosed in a forthright manner, and if the defense had properly evaluated that evidence, the prosecution would have been unable to use the coat in this manner to wrongfully characterize Petitioner as a "gangster." Zimmermann was well aware that the victim's blood was not on the coat and, as pointed out above, in an internal memo he specifically referred to that fact as a weakness in the case. (FEx. 42, Bates stamp 000678). It was therefore a deceit for him to display the coat to the jury, representing that Petitioner wore the coat that evening, while at the same time withholding the information that the coat had tested negative for blood stains.

(ii) <u>False Portrayal of 1972 Conviction</u>.

The prosecution also took advantage of the effect of their misconduct to mischaracterize Petitioner's prior murder as a premeditated, deliberate murder, contrary to all of the evidence in the 1972 case.

> Because you see, he had faced this jury before; not you, but he had faced a jury before and heard the very same thing before, when he murdered someone else, **willfully, deliberately with malice aforethought**.

(Sentencing stage closing argument, T. 1979).

> Ladies and gentlemen, he was a murderer, and he was a murderer before he ever got in that group – just a low down murderer, no morals – no morals.

(Sentencing stage closing argument, T. 1982).

If the prosecution had refrained from misrepresenting the circumstances surrounding the 1972 conviction and had disclosed the exculpatory evidence in their files about the 1972 case, and if Petitioner's counsel had properly investigated the 1972 case, then this false characterization never would have been presented to the jury. Instead, the jury would have been told the truth: that the 1972 murder was an emotionally charged response by a mentally ill person to repeated homosexual rape in prison and, that under the Tennessee definition of insanity at least, Petitioner probably was insane at the time of that offense. The prosecution never would have gotten away with mischaracterizing the 1972 murder in a prejudicial way as a "deliberate" murder.

(iii) <u>False Picture of the Circumstances Surrounding the 1986 Offense</u>.

By failing to turn over *Brady* material regarding Miller's prior statements to the prosecution and information about the SGM, and by improperly manipulating Miller to give false and misleading testimony, the prosecution created the situation where they could deliberately misrepresent to the jury the circumstances surrounding the offense in this case. Although Petitioner and Miller went to Daniels' apartment as part of a mission organized by the SGM (including Allen Boyd and William Beard) with the altruistic (albeit misguided) purpose of ridding the community of drugs, the prosecution mischaracterized the offense as a pure drug robbery entirely designed and led by Petitioner.

The prosecution began the mischaracterization of the offense in their guilt stage opening statement:

> And later that evening the defendant told Mr. Miller that he knew of a guy that they can roll, that they could rob, that they could gangster him and steal his drugs.

(T. 1275).

The prosecution, through Miller's manipulated testimony, further characterized the offense as a drug robbery without any reference to the SGM or the motives behind the event:

> A little bit later on he had pulled me off to the side and he said, you know, this little punk over here that I got this from has got some pretty good reefer, you know, I think we can probably go over there and … He told me that he had got some good weed from the guy. The guy had some good weed. And he had reason to believe that he had more. And he said that the guy was a little punk and we could probably go gangster him…. To me that meant, going, taking his dope, his marijuana – rousting him up and, you know, taking his --- [Robbing him?] Yes.

(T. 1449-50).

Also through Miller's manipulated testimony, the prosecution characterized the "plan" as entirely Petitioner's, again without reference to the SGM:

> Q. Did you agree to that plan?
> A. Yes, I did.
> Q. Whose plan was it?
> A. It was the defendant's.

(T. 1451).

This false characterization was carried into the prosecution's guilt stage closing argument where the prosecution misrepresented to the jury:

> And who was the leader of this whole thing? Who gave all the orders? Who gave all of the commands?" [Referring to Petitioner.]

(T. 1706).

The multiple instances of prosecutorial misconduct finally enabled the prosecution, in the sentencing stage closing argument, to discredit as "bunk" any notion that the

SGM was involved, even though the prosecution was told about the SGM's involvement:

> [H]e [the Petitioner] knows that that story about being a religious cause will be rejected by you as bunk.

(T. 1982-3).

If the prosecution had honored their *Brady* obligation by turning over to the defense prior to trial the statements made to them by Miller and the information they had received about the SGM, and if defense counsel had properly investigated this case, the prosecution never would have been in a position to paint this kind of false and prejudicial picture to the jury.

(iv) False Picture of Petitioner's Attitude Towards the Offense.

By deliberately making misrepresentations to MTMHI and to defense counsel regarding petitioner's prior 1972 murder conviction, and by withholding *Brady* material regarding both the prior conviction and the other signs of Petitioner's mental illnesses and emotional instability, the prosecution was able to invent for the jury the prosecution's own false picture of Petitioner as a "depraved killer" who had no psychological or emotional problems.

The prosecution repeatedly misrepresented to the jury that Petitioner had no emotional or psychological problems and therefore was just a "depraved" completely immoral person, which clearly is not the case. The prosecution established this false theme at the outset of the sentencing hearing:

> [I]t showed the depraved mind the defendant really has. Not a sick mind. **Not so sick of a mind that he is mentally ill**, just depraved – just depraved.

(Sentencing stage opening statement, T. 1805).

This theme was carried through to the sentencing stage closing argument:

> That's because, ladies and gentlemen, you're looking at a depraved man, **not someone suffering from severe extreme emotional disturbance**, a depraved man.

(Sentencing stage closing argument, T. 1981).

> [N]ow, he [defense counsel] voir dired you on, would you believe a psychiatrist, or a psychiatric examination or whatever, about **extreme emotional disturbance or whatever? There is none of that here today**.

(Sentencing stage closing argument, T. 1981-2).[23]

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[23] In fact, there is abundant and irrefutable evidence that Petitioner suffers from mental illness and that he had mental state guilt stage defenses available to him at the time of his trial. Petitioner has a long documented history of displaying symptoms of mental illness, of being institutionalized for and receiving diagnoses of mental illness, and of being administered powerful antipsychotic and other medications for mental illness. *See* Social History (FEx. 141). As pointed out elsewhere, in Petitioner's 1972 trial Dr. Masri, a psychiatrist, gave Petitioner a borderline personality diagnosis and testified further that Petitioner "decompensates" when under stress – an evaluation similar to Dr. Sadoff's evaluation presented to this Court. Even the psychiatrist who testified for the prosecution in the 1972 case, Dr. Robert J. Eardley, testified that the Petitioner lost control under the stress of the moment and, when asked if the Petitioner had been temporarily insane at the time, testified that he did not know. (*See* FEx. 131, Bates stamp p. 781). In Petitioner's state post-conviction hearing, Dr. Nurcombe, a psychiatrist, similarly diagnosed Petitioner with Post-Traumatic Stress Disorder. Dr. Nurcombe's testimony went unchallenged by the state. In this habeas proceeding, both Dr. Sadoff and Dr. McCoy diagnosed Petitioner with mental illnesses. Although Dr. Craddock of MTMHI did not give Petitioner a diagnosis, he admitted that he did not have access to Petitioner's social history, and he acknowledged many of the symptoms of Petitioner's mental illness. (FT. 130-2). Dr. Craddock, therefore, testified before this Court that he "would not take issue" with a diagnosis of Borderline Personality Disorder for Petitioner. (FT. 140). Dr. Craddock acknowledged that persons with this kind of disorder can suffer dissociative and psychotic episodes. (FT. 129, 132: "That is what borderline personality disorder means. The borderline of becoming psychotic.") Dr. Craddock also admitted that he never reached an opinion

Because the prosecution's pattern of misconduct, combined with the ineffectiveness of defense counsel, allowed the prosecution to falsely portray Petitioner as being a person without mental illness or emotional disturbance, the prosecution created a situation where it could falsely claim in a highly prejudicial manner that Petitioner killed for "pure pleasure" and "enjoyment". The prosecution struck this theme in the guilt stage of the case and carried over to the sentencing stage through effective repetition:

> Whoever did that, ladies and gentlemen, **enjoyed it**, had to have.

(Guilt stage closing argument, T. 1679).

> It was all part of the **enjoyment** that person who did the stabbing had.

(Guilt stage closing argument, T. 1711).

> Is there any reason, is there any justification why he took the life of Patrick Daniels? Is there any? None, except **pure pleasure**.

(Sentencing stage closing argument, T. 1942).

> Ladies and gentlemen, as a man thinketh in his heart, so is he. And you saw the real James Jones in the picture. And now, when you saw those convictions, you know that's the real James Jones because that's how he is. and when he comes here from Chicago, he is not here two years before a vicious brutal murder at his hands – at his planning – **at his enjoyment** – and that's depraved.

(Sentencing stage closing argument, T. 1984-5).

The net effect of the prosecutorial misconduct together with the ineffective assistance of counsel, therefore, was to falsely paint Petitioner as the ideal candidate for a guilty

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on whether or not Petitioner had a diminished capacity mental state guilt stage defense, or whether or not Petitioner's mental condition might be a mitigating factor at sentencing. (FT. 142-3).

verdict for premeditated murder and the death sentence: a cool-minded "depraved" "gangster" with "no morals" and free of any mental illness or emotional disturbance who singularly planned and led a drug robbery, designed purely for personal gain, and in the course of that robbery killed for pure pleasure and enjoyment. As the abundant and compelling evidence in this habeas proceeding shows, however, Petitioner is not that type of person, the SGM was deeply involved in directing Petitioner's actions, and the true circumstances surrounding the offense are entirely different from what the prosecution falsely portrayed to the jury. As the jury affidavits demonstrate, and as should be clear from the face of the record after considering the cumulative effect of all the errors in this case, if the jury had been presented with the true picture of Petitioner and the circumstances surrounding the offense, the result of the trial would have been completely different.

V. The collective consideration of claims

Previously, in this Memorandum, Petitioner cited authority for the proposition that it is incumbent on this Court to cumulate error in the determination of whether this trial was fair and its result reliable. In the process of making this determination, as far as errors of the prosecutor and defense counsel are concerned, it is not necessary to demonstrate that the outcome would have been different, but for the errors. It is necessary only for this Court to ultimately determine that the errors "undermine[d] confidence in the outcome." Strickland, *supra*, 104 S.Ct. at 2068; and, *Kyles, supra,* 115 S.Ct. at 1565. If this Court's confidence in the outcome is "undermine[d]" by the errors committed, it must grant relief. The law requires that the final measure of whether this undermining of the confidence has occurred can only be taken upon a cumulative and collective consideration of the errors committed in the case that contributed to the result.

A. Prosecutorial misconduct claims erroneously deemed defaulted.

We have demonstrated in this Motion and Memorandum that recently promulgated Tenn. Sup. Ct. R. 39 made clear that this Court erred in its determination that claims raised in the appeal of right to the state Court of Criminal Appeals, but not in the Tenn. R. App. P. 11 discretionary appeal to the state Supreme Court, were defaulted and not preserved for federal review. Petitioner now asks this Court, pursuant to F. R. C. P. 60(b), to review on the merits those preserved claims. Specifically, the claims to which Petitioner refers are the prosecutorial misconduct claims made in Petitioner's Amended Petition, ¶¶ D.1.(2)-(4), (6)-(8), (12); D.2.(1)-(3); D.3; D.6; and D.8.(4). *See*, Motion at ¶ 23. Petitioner has demonstrated the materiality of these instances of prosecutorial misconduct sufficient to require this Court to set aside the conviction and sentence in this case. When the above-listed instances of prosecutorial misconduct are considered collectively with the other errors in this case, including other errors of prosecutorial misconduct and errors of ineffective assistance of counsel previously recognized by this and other courts, there can be little doubt that this case must be reversed. *See*: (1) attached hereto, Appendix A: a chronological summary of the instances of prosecutorial misconduct and ineffective assistance of counsel and how they cumulated to eliminate any opportunity for a fair trial in this case; (2) attached hereto, Appendix E: a summary of record evidence that Petitioner was not the assailant; (3) filed in separate pleading: the Affidavits of eight jurors, who deliberated in this case, reflecting their reaction to the fact that they were not give an opportunity to consider critical, relevant evidence in the trial of this case.

B. Prosecutorial misconduct claims previously considered by this Court

From among these instances of prosecutorial nonfeasance and misfeasance, referred to above, this Court has already considered on the merits the claims found at ¶ D.1.(1) (the prosecution's failure to produce the 1972 murder trial transcript); and ¶ D.1.(7) (the prosecution's failure to produce lab reports indicating no blood stains on clothes).

With regard to ¶ D.1.(1) (the prosecution's failure to produce the 1972 murder trial transcript), this Court evaluated the claim in its opinion, 999 F.Supp. at 1089-90, and concluded that the 1972 transcript "would not have affected the result" of the guilt stage, *Id.* at 1089, and was "not persuaded" that its absence "undermine[d] confidence in the outcome of the sentencing hearing,"*Id.* at 1090. The Court specifically noted that it reached this conclusion considering the effect of the absence of the 1972 transcript "standing alone," *Id.* Petitioner asks this Court to reconsider that conclusion for the reasons set out in this memorandum upon consideration of the cumulative effect of other identified errors, and not "standing alone."

With regard to ¶D.1.1(7) (the prosecution's failure to produce lab reports indicating no blood stains on clothes), this court concluded that it was not a proper *Brady* claim, because defense counsel could have had access to the information from sources other than the prosecutor. *Id.* at 1090. If it is not a proper *Brady* claim, by this Court's own conclusion it is necessarily an instance of ineffective assistance of counsel. It is one or the other, *See*, *Banks v Reynolds*, 54 F.3d 1508, 1515, n. 14 (10th Cir. 1995) (recognizing the propriety of considering claims, such as this, as alternatively either prosecutorial misconduct or ineffective assistance of counsel); and, Petitioner has, in fact, plead it in the alternative, *See,* Amended Petition, §§ D.(1)(7) (prosecutorial misconduct); and, A.(1) and (2); E.(2)(a) and (e) (ineffective assistance of counsel). This Memorandum, and attached appendices,

together with the reaction of jurors, as reflected by their Affidavits, filed separately, makes clear the prejudice suffered by Petitioner at guilt and at sentencing created by the absence of this evidence in the jury's deliberation.

C. Prosecutorial misconduct claims previously considered by the Tennessee Supreme Court.

In addition to the instances of prosecutorial misconduct identified, above, on the direct appeal of this case from trial, the Tennessee Supreme Court considered on the merits the fraction of prosecutorial misconduct claims that were revealed on the face of the trial court record. With regard to these relatively few instances of prosecutorial misconduct in the record at the time, the Tennessee Supreme Court found that the "conduct of the State's attorney [Zimmermann] bordered on deception" and "was improper," but, nevertheless concluded that these instances of prosecutorial misconduct did not require reversal. *State v Jones*, 789 S.W.2d 545, 552 (Tenn. 1990). The Tennessee Supreme Court did not consider these instances of prosecutorial misconduct cumulatively and collectively with other instances of prosecutorial misconduct, all instances of ineffective assistance of counsel, and the other errors committed in this case. This Court is in a position to consider these claims along with other errors reflected in the record that is now complete.

D. Instances of ineffective assistance of counsel.

At the trial of this case, Petitioner had viable defenses in the guilt stage that he was not the assailant and that, whether he was the assailant or not, he was insane at the time of the offense, both of which would have been consistent and complementary with the mitigation that he had to present at the sentencing stage of the trial. In spite of the availability of these defenses, defense counsel did not investigate potential defenses and did not present any defense, did not call any witnesses, and did not present any proof at all. At the

sentencing stage of the trial, Petitioner had an abundance of available mitigating evidence of which this Court is well familiar and which was addressed in this Court's opinion. *See* 999 F.Supp. at 1096-1102. Notwithstanding the availability of this abundance of mitigating evidence, defense counsel did not investigate it and was unaware of it. Consequently, he did not present it to the jury. *See*, Appendix A.

All of the state and federal courts sitting in collateral review of this conviction and sentence have agreed that the performance of counsel was constitutionally inadequate at both the guilt and sentencing stages. *See*, 999 F.Supp. at 1095. The only question among the courts was that of whether sufficient prejudice was created by the failures of counsel to warrant reversal. Since the only question was the sufficiency of the prejudice caused by counsel's recognized failures, then a review of claims becomes only a question of measuring the degree and impact of the prejudice. Whatever degree of prejudice exists at the guilt stage, as well as at the sentencing stage, whether or not it is sufficient standing alone to warrant reversal, must be considered collectively and cumulatively with other errors committed in the case in order to determine whether the cumulation of error warrants reversal.

From among the reviewing federal judges, including this Court and the Circuit panel, two of the four judges, who have reviewed the case, have found the prejudice sufficient to set side the sentence of death. Yet, none of the federal judges, including the two who decided to set the sentence of death aside, considered any issue other than the single question of whether the sentence of death should be set aside due to counsel's ineffectiveness at the sentencing stage. None of the judges considered any of the other claims properly raised by Petitioner, including the errors of counsel other than those committed in the sentencing stage of the trial, including the myriad instances of prosecutorial misconduct, and including any other errors committed in this case, cumulatively and

collectively with the claim of ineffective assistance of counsel at the sentencing stage of the trial.

Pursuant to T.C.A. § 39-2-203(h), a Tennessee capital defendant will avoid a sentence of death, if only a single juror holds out for a life sentence. Consequently, the prejudice determination involves only a determination of whether confidence in the outcome is sufficiently undermined so that "**one** juror **could** have found that he did not deserve the death penalty." (Emphasis added.) *Carter v Bell*, 218 F.3d 581, 592 (6th Cir. 2000) (single juror prejudice rule applied in Tennessee case); *see, also*, *Coleman v Mitchell*, 2001 WL 1194919, Sixth Circuit No. 98-3545, filed October 10, 2001 at 28 (single juror prejudice rule applied in a Ohio case). This standard has easily been met upon a collective evaluation of the universe of error that occurred in this trial. *See*, Jurors Affidavits, filed in separate pleading.

Tennessee law specifically recognizes lingering or residual doubt about guilt as proper mitigating evidence. *See*, *State v Teague*, 897 S.W.2d 248 (Tenn. 1995). In fact, Tennessee law requires the jury to consider the proof presented in the guilt stage during its deliberation in the sentencing stage. *See* T. C. A. § 39-2-203(e) (jury is directed by the instructing court to consider "any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both"). If no defenses are presented during the guilt stage of the trial, as occurred in this case, nothing is presented in that stage for the jurors to consider in the sentencing stage, though viable defenses may have existed, as they did in this case.

The available and viable guilt stage defenses that trial counsel failed to present would have been persuasive mitigating evidence. Indeed, the available but unpresented guilt-stage defenses (*i.e.* that Petitioner was not the assailant, and that Petitioner did not have sufficient *mens rea*) may have been the strongest available mitigating evidence that Petitioner could have presented in this case. Assistant District

Attorney John Zimmermann testified that he anticipated it would be difficult to persuade the jurors to impose a sentence of death in this case. He stated that, in order to obtain a death verdict, it would be necessary to convince the jurors that Petitioner was the assailant "not beyond a reasonable doubt, but beyond a shadow of a doubt," FT 905. *See*, generally, FT 905-908. His opinion in that regard is reflected to be true in other cases, as well. In a study entitled *Why Jurors Vote Life or Death: Operative Facts in Ten Florida Death Penalty Cases*, Geimer and Amsterdam, 15 *Am. J. Crim. Law* 1 (1988), the authors concluded that the existence of some degree of doubt about the guilt of the accused was overwhelmingly the most often recurring factor in the juror's vote for a life sentence. *See*, particularly, 15 Am. J. Crim. Law at 28-34. In that study, 69% of the jurors interviewed identified "lingering" doubt about guilt as the "operative factor" in the vote for life. *See*, Table 2, 15 *Am. J. Crim. Law* at 27. Though guilt stage defenses may be considered to be the strongest mitigating evidence, in the determination of whether counsel was ineffective in this case, his failure to present guilt stage defenses has never been considered collectively with other errors in the determination of whether Petitioner's sentence of death should be set aside.

In order to properly evaluate the fairness and the reliability of this trial, it is incumbent on this Court to consider the total failures of defense counsel, both his failure to affirmatively present any of Petitioner's available defenses at both stages of the trial as well as his failure to rebut the fraudulent case presented by the prosecution, collectively and cumulatively with the instances of prosecutorial withholding of exculpatory evidence and the prosecutor's intentional deceit of Petitioner's evaluators, his defense counsel, the court, and the jury. Upon that evaluation, it is obvious that it would be a travesty of justice to allow this conviction and sentence to stand.

VI. Conclusion

For the foregoing reasons, this Court should grant Petitioner's Rule 60 motion and reverse its earlier dismissal of the substantial body of Petitioner's prosecutorial misconduct claims.

This Court should consider the merits of Petitioner's prosecutorial misconduct claims based upon the evidentiary record already created in this case.

In addressing Petitioner's prosecutorial misconduct claims, this Court should consider the claims both individually and cumulatively with all of Petitioner's other claims, including the claims of ineffective assistance of counsel at both the guilt and sentencing stages of Petitioner's case. The proof in this habeas case establishes prosecutorial fraud and deceit which constitute *per se* violations of Petitioner's constitutional rights requiring reversal of Petitioner's convictions and his death sentence. Viewed cumulatively with the other errors in Petitioner's case, including but not limited to the errors arising from the ineffectiveness of Petitioner's trial counsel, the proof in this habeas case establishes that Petitioner was grossly prejudiced at both the guilt and sentencing stages of his case.

Accordingly, this Court, upon considering all of Petitioner's claims, must grant Petitioner a writ of habeas corpus setting aside Petitioner's convictions and death sentence.

Respectfully submitted,

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OTHER COURT REPRIMANDS OF ZIMMERMANN, Appendix D To *Petitioner's Memorandum In Support Of Motion For Relief From Judgment Pursuant To Fed. R. Civ. P. 60(B).*

In a string of court opinions over the course of Zimmermann's career as a prosecutor (including opinions in Abu-Ali's case), the courts have repeatedly reprimanded Zimmermann for various legal and disciplinary violations. These reprimands demonstrate certain persistent patterns:

(i) Zimmermann's pattern of withholding exculpatory evidence;

(ii) Zimmermann's pattern of "misleading" defense counsel and the court; and

(iii) Zimmermann's pattern of knowingly violating court rulings relating to inadmissibility of evidence and improper jury argument.

Some of these court opinions are listed below:

1. In the direct appeal of Abu-Ali's case from the trial court to the Tennessee Supreme Court, Zimmermann was reprimanded by the Tennessee Supreme Court for handing inadmissible material to the jury during Abu-Ali's sentencing hearing. The Tennessee Supreme Court said:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. .... The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on

> the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. **The action of the State was improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn. 1990). The Tennessee Supreme Court held, however, that this prosecutorial misconduct was "harmless," and therefore denied this claim as a basis for reversing the death sentence.

2. In the federal district court habeas proceeding, Judge Campbell held that Zimmermann committed a *Brady* violation by failing to turn over to Abu-Ali's trial counsel the transcript of Abu-Ali's prior (1972) murder trial. This transcript contained testimony of two psychiatrists, one for the defense and the other for the prosecution, which described aspects of Abu-Ali's mental illnesses and would have supported an insanity defense under Tennessee's definition of insanity. Although Judge Campbell found that Zimmermann had violated his *Brady* obligation to turn over this exculpatory evidence, Judge Campbell also found that, "standing alone," this instance of prosecutorial misconduct did not "undermine[s] confidence in the outcome of the sentencing hearing," and therefore he rejected this claim as a basis for awarding Abu-Ali relief. *Abu-Ali Abdur'Rahman v. Bell*, 999 F.Supp. 1073, 1089-90 (M.D.Tenn. 1998). Judge Campbell, however, did grant relief on grounds of ineffective assistance of counsel.

4. In *In re Zimmerman*, 1986 WL 8586 (Tenn.Crim.App. 1986), Zimmerman was held in contempt of court for violating Rule 16, Tenn.R.Crim.P., which is the rule

requiring the prosecution to disclose certain types of evidence to the defense prior to trial. Zimmermann argued that his noncompliance with Rule 16 "was clearly made through oversight" (his words) and was not "willful." The Court of Criminal Appeals said that this was not an excuse and characterized Zimmermann's actions as an **"abuse of, or unlawful interference with, the process or proceedings of the court."**

5. In *Zimmermann v. Board of Professional Responsibility*, 764 S.W.2d 757 (1989), Zimmermann was sanctioned for making inappropriate comments to the press in violation of the disciplinary rules. The court rejected his argument that his comments were protected by the First Amendment.

6. According to a Tennessean article published May 30, 1998, in the case of *State v. Vukelich* Zimmermann was chastised by Davidson County Circuit Court Judge Gayden for "misleading" the court into improperly issuing a seizure order for the seizure of a $102,000 investment account owned by the defendant and his wife which allegedly contained the proceeds of drug sales. According to the article:

> Circuit Judge Hamilton Gayden testified that he should not have signed the original seizure order March 13. Gayden said that, "upon reflection," he believes Zimmermann and Metro Drug investigator Ed Rigsby did not present enough evidence about the source of the funds to justify seizing them as the fruits of illegal drug dealing...The judge testified that **Zimmermann and Rigsby misled him into believing** that the money in the mutual fund account came from illegal activity."

Judge Gayden set aside the seizure order and directed that the investment account be returned to the Vukelichs.

7. In *State v. Middlebrooks*, 995 S.W.2d 550 (1999), a death penalty case, Zimmermann was reprimanded

for making two kinds of improper closing arguments to the jury at the conclusion of capital sentencing hearing. First, the court found that Zimmermann's "victim impact" argument was improper:

> [T]he prosecutor's statement, "his family asks you to impose the death penalty," was improper. Although evidence to this effect was not introduced during the sentencing hearing, and would have been inadmissible, the prosecutor's statement clearly is an improper characterization of the family's view as to the appropriate sentence.

Id. at 558. Secondly, the court found that Zimmermann's biblical references during closing argument (which were extensive) were also improper:

> We have condemned Biblical and scriptural references in a prosecutor's closing argument so frequently that it is difficult not to conclude that the remarks in this case were made **either with blatant disregard for our decisions or a level of astonishing ignorance of the state of the law** in this regard.... As we said in Cribbs, "in the face of this clear and longstanding precedent, **the repeated introduction by prosecutors of such references into trials of serious criminal offenses is inexplicable**."

Id. at 559. Although the court found these arguments to be improper, it also determined that these errors were harmless and therefore the court did not reverse the judgment below.

8. The more recent case of *Garrett v. State*, 2001 Tenn.Crim.App. LEXIS 206 (2001), presents a particularly egregious example of prosecutorial misconduct. The defendant was convicted of first degree murder and sentenced to life. The prosecution's theory at trial was that the defendant locked the victim in the room of a house and then burned the house down, killing the victim. A key factual issue at trial was whether the room where the victim was

found had been locked from the outside, which is what the prosecution alleged. Zimmermann had in his files an eleven-page report by an investigator which described a conversation with the Fire Detective who told the author of the report that the door to the room was, in fact, unlocked. Zimmerman never turned his report over to the defense counsel. In the post-conviction hearing, Zimmermann explained that he did not turn over this report to the defense because , essentially, he felt this information was unreliable. The Tennessee Court of Appeals rejected Zimmermann's explanation and found that he committed a *Brady* violation. Consequently, the court set aside the conviction and granted the defendant a new trial. The Court said:

> We are most troubled with the eleven-page Miller Report, which was not disclosed to the defendant.... The State contends that this report was neither withheld, exculpatory, nor material. We disagree in all respects. The evidence in the post-conviction hearing showed that **the prosecutor led defense counsel to believe** that the State had no information about the locked or unlocked status of the utility room door. However, at trial the State's witnesses testified that the utility room door was locked and the prosecutor submitted to the jury as the theory of the State's case that the defendant locked the victim in the utility room and set the house on fire. Therefore, the State did have, prior to trial, information that the door was locked. In fact, not only did the State have information that the door to the utility room was locked, but they also possessed the eleven-page Miller Report, which indicated otherwise: that Fire Captain Jenkins, who was the firs to enter the utility room and find the victim's body, found the door unlocked.
>
> This eleven-page report was clearly withheld from the defendant. However, the State, in its brief, claims that because Officer Miller informed defense

counsel that the door was unlocked then this information was not withheld. The State's assertion that the defendant was aware that the State had no information that the door was locked is undermined by the State relying so heavily at trial on testimony that the door was locked. Assistant District Attorney General Zimmerman, when questioned at the post conviction hearing as to why he did not include the eleven-page report in discover, stated, "I felt like Detective Miller's recollection was vague, he could not specifically remember the conversation he had with Captain Jenkins, and all he knew is what he had recorded in his report, which was equivocal, at best, and Jenkins was absolutely clear on it." **This Court is extremely troubled with General Zimmerman's decision** to himself determine the reliability of the evidence and to refuse to turn over evidence he believes is unreliable, especially when the evidence is requested and is exculpatory.

> Essentially, the State **intentionally withheld the information by leading the defendant to believe** they had no information about the status of the door and then pursuing the very opposite theory at trial: that the defendant had locked the victim in the utility room and set the house on fire. We agree with the defendant that the information was withheld.

9. *State v. Vukelich*, 2001 Tenn.Crim.App. LEXIS 734 (Sept. 11, 2001), was a drug trafficking and money laundering case that went to trial two times. In the first trial, Zimmermann asked a witness whether he had smoked marijuana with the defendant on two prior occasions. The trial judge ruled those questions to be irrelevant and inadmissible. In the second trial, despite the trial judge's ruling in the first trial, Zimmermann asked the same witness the very same questions. As described by the appellate court:

> The [trial] court immediately asked for a bench conference and excused the jury. The prosecutor apologized and claimed to have forgotten the trial court's earlier ruling, and **the trial court strongly admonished the prosecutor**.

Later in the opinion, the appellate court said that "the testimony solicited was **patently improper** given the trial court's previous ruling." The appellate court went on to say, however, that this error was harmless because the other evidence of the defendant's guilt was substantial.

EVIDENCE THAT PETITIONER WAS NOT THE ASSAILANT, *Appendix E To Petitioner's Memorandum In Support Of Motion For Relief From Judgment Pursuant To Fed. R. Civ. P. 60(B).*

The evidence in this case demonstrates that Petitioner was not the assailant who killed the murder victim, Patrick Daniels. At the very least, the evidence raises reasonable doubt about whether Petitioner was the assailant. Accordingly, the evidence fails to establish that Petitioner is guilty of premeditated murder. For this reason alone, Petitioner should be entitled tc a new trial regarding guilt. Moreover, the blood evidence clearly creates residual doubt about whether Petitioner was the assailant, which is an additional mitigating factor that must considered in this case. *State v. Teague*, 897 S.W.2d 248, 256 (Tenn. 1995); *State v. Hartman*, 42 S.W.3d 44 (Tenn. 2001). The effect of the unpresented blood evidence must be cumulated with the prejudicial effects of the other errors in this case.

A. According to the blood evidence, the assailant would have had blood stains on his clothes.

In the face of the crime scene photos and the police reports describing the extensive blood splattering, even Zimmermann testified before this Court that the assailant almost certainly would have had blood on his clothes. (FEx. 2-3; FT. 917). Dr. Kris Sperry gave his unrebutted expert testimony that, given the nature of the victim's wounds and the amount of blood splattering, the assailant certainly would have had blood on his clothes. (FT. 37-8, 77).

B. Petitioner's clothes tested negative for blood stains.

Petitioner's clothes tested negative for blood stains. These clothes included Petitioner's long dark wool coat that he was wearing on the night of the offense. (FEx. 115, 117). According to Dr. Sperry, the tests performed by the T.B.I. crime lab would have detected the blood stains. (FT. 38, 61). He also testified that the blood stains could not have been cleansed from the wool fabric of the coat without

permanently damaging the fabric. (FT. 59-61).

C. <u>Therefore, because Petitioner was wearing his long black wool coat at the time, he could not have been the assailant</u>.

The prosecution recognized that the absence of blood on Petitioner's clothes was a weakness in their case. See Zimmermann's internal memo (FEx. 42, at Bates stamp p. 000678). As acknowledged by this Court, the only way to reconcile the blood evidence with the charge that Petitioner was the assailant would be to assume that Petitioner somehow was not wearing the coat at the time of the assault. (See this Court's opinion, 999 F.Supp. 1085). There are at least two problems with this assumption:

First, all of the evidence in the case tends to show that Petitioner wore his long dark wool coat at the time of the offense. Norma Norman testified that Petitioner was wearing the coat from the time he entered the apartment on the night of the offense to the time she was tied up and blindfolded. (T. 1332, 1334, 1343, 1364, 1366-7). Devalle Miller, the co-defendant, also testified that Petitioner was wearing the long wool coat at the time of the offense. (T. 1451, 1454, 1462, 1465). The prosecution introduced this same wool coat into evidence (as Trial Exhibit 12), identified the coat as the one that Petitioner was wearing at the time, and showed the coat to the jury during the guilt stage closing argument in support of their argument that Petitioner was the assailant. (T. 1333, 1672-3).

Second, as described in Petitioner's briefing to this Court, the evidence in this habeas proceeding establishes that the prosecution spent literally hours preparing Miller, the only eyewitness to the assault, to testify at Petitioner's trial. At no time has Miller ever said that Petitioner took off his coat during the assault. Given the prosecution's acknowledgement of the weakness in their case raised by the blood evidence, if Petitioner did take his coat off for the assault, then certainly the prosecution would have elicited that information from

Miller. Because Miller never said that Petitioner was without his coat, and because there is absolutely no other evidence that even hints that Petitioner took off his coat at the time of the assault, the inescapable conclusion is that Petitioner wore the coat throughout the offense including the precise time when the assault occurred.

D. <u>The evidence supports the proposition that Miller was the assailant</u>.

By contrast, there are a number of reasons to suspect that Miller in fact was the assailant. These reasons include the following:

1. According to Norman's testimony, while Petitioner and Miller were in the apartment, Miller was standing in the kitchen area. Accordingly, he would have had easy access to the knife that was used in the assault. (T. 1344).

2. Also according to Norman's testimony, before she was tied up, Miller was in a panic and threatened to kill the dogs. (T. 1371). He therefore was obviously fearful of how the dogs might draw attention to what they were doing, and it can be assumed that he would have been fearful of leaving either Daniels or Norman as witnesses. If in his panic he threatened to kill the dogs, it is reasonable to imagine that he would have been willing to kill Daniels and Norman.

3. On the day of Petitioner's arrest, two days after the offense, when Petitioner's wife was driving Miller to his apartment, Miller acted strangely by taking off his field jacket and work shirt and throwing them in the back of the car. His trial testimony on this went as follows:

> Q. Did you leave anything in the car that day?
>
> A. Yes, I did. I was pretty scared and pretty uptight. I took off my - I had a field jacket on and a work shirt, and I left them in the car.
>
> Q. Where did you place that field jacket and work shirt?
>
> A. I just threw them in the back.

> Q. Mr. Miller, can you explain what you did that for?
>
> A. I was just panicking and scared.
>
> Q. Panicking and scared about what?
>
> A. I feared - I thought that, you know, somebody might recognize me walking back to my apartment, and, you know, I just thought I might get picked up, so I took - threw the jacket and the shirt off.

(T. 1481). Miller's explanation for this unusual behavior was not satisfactory. This behavior reveals a fearful response to the situation, which would be consistent with the idea that he was the assailant. The most logical explanation of this behavior is that Miller did not want to be caught wearing clothes that might contain signs of the assault, i.e. blood stains. It is significant that Miller's clothes never were tested for blood stains.

4. Most significantly, in his original statement to the prosecution and at Petitioner's trial, Miller gave clearly fabricated descriptions of the assault. In his original statement to the prosecution, Miller said Petitioner "proceeded to stab [Daniels] numerous times uh both in the back and in the chest." (FEx. 51, at Bates stamp p. 000166). At Petitioner's trial, Miller testified that immediately after the assault, Daniels "was laying on the floor. And he was - he was face down, I believe - he was face down. And he was just going into convulsions, ..." (T. 1472; See, also, FEx. 119). Dr. Sperry testified, however, that Miller's testimony contradicted the physical evidence. (FT. 47-50). Dr. Sperry pointed out that the medical examiner's autopsy report indicated that Daniels suffered stab wounds only in the front chest area, and not in his back as Miller had testified. (See, also, the autopsy report and Dr. Harlan's trial testimony: FEx. 14, 113 and 114; T. 1658). Dr. Sperry further testified that, based on the blood patterns revealed by the crime scene photos, Daniels could not have been lying face down, again contrary to Miller's

testimony. (See, also, FEx. 3, the police report describing Daniels as "laying face up on the floor.") Again, Dr. Sperry's testimony on these points was unrebutted, and the state has offered no explanation to reconcile Miller's testimony with the physical evidence.

The fact that Miller gave fabricated descriptions of what actually happened with Daniels demonstrates that he was making things up. Given that he confessed to participating in the events leading up to the assault and was prepared to plead guilty to second degree murder in exchange for his testimony, there is only one plausible reason for Miller's fabricated account of the assault: there was something important about the assault that he wanted to hide. The best explanation is that Miller, in fact, was the assailant.

Other than Miller's own testimony, which is inherently unreliable, all of the evidence in the case is consistent with the theory that Miller was the assailant.

D. <u>Petitioner's sentencing hearing "confession" does not rebut these conclusions</u>.

In light of the foregoing evidence, the state has offered only one rebuttal to the theory that Petitioner was not the assailant. The state relies on Petitioner's sentencing hearing testimony where the state alleges that he confessed to the killing. This rebuttal, however, is flawed for the following reasons:

1. Every witness who has spent time with Petitioner during the period after the offense has testified that Petitioner has consistently reported that he does not remember what happened when Daniels was killed. <u>See</u> testimony of Susie Bynum (FT. 1245), Neal McAlpin (FT. 212), Sumter Camp (FT. 732-3), Richard Dinkins (FT. 888), and Dr. Sadoff (FT. 471-2, 485). The MTMHI records also reflect that during their evaluation of him, he lacked any recollection of what happened at the time of the assault. In the Interdisciplinary Notes dated 2/11/87 from the MTMHI file, Dr. Marshall reported, "When asked about killing the allegedly [sic]

victims he said I don't know if I killed him or not." (FEx. 125).

2. Contrary to the state's assertions, Petitioner's sentencing hearing "confession" did not reflect a recollection of what actually happened. Nowhere in his sentencing hearing testimony did Petitioner ever say that he recalled stabbing either of the victims; and in fact he tried to say that he did not have any such recollection. (*See, e.g.*, T. 1865, where Petitioner said, "I don't remember," and T. 1996, where Petitioner said that he was admitting to the killings because of "information you [the prosecutor] have given," and not because of his own recollection of what happened). The exact nature of Petitioner's testimony, and the fact that he never admitted to having a specific recollection of the assault, was discussed in some detail during Dr. Sadoff's testimony before this Court. (FT. 486-497).

3. The fact that Petitioner has no recollection of what happened is consistent with his documented history and his mental illness. As Dr. Sadoff testified, and as reflected in Petitioner's social history, Petitioner has a history of "hysterical blindness" or blackouts. Also as Dr. Sadoff explained, this kind of history is characteristic of someone like Petitioner who suffers from Post-Traumatic Stress Disorder and Borderline Personality Disorder. (FT. 463, 472-3).

4. To the extent Petitioner may have made a confession during his sentencing hearing testimony, that confession was not reliable. Due to his mental illnesses, Petitioner is emotionally unstable. (FT. 467, 483). Petitioner received ineffective representation at trial and he therefore presumably felt unprotected when he was called to the witness stand. He was never prepared for his testimony, and in fact did not know he was about to testify until moments before he was called to the stand. (FT. 731-2, 765). His "confession" occurred under relentless cross examination, and he basically broke down on the stand such that the trial court found it

necessary to call a recess so that he could compose himself. (T. 1871, FT. 731). Sumter Camp testified before this Court that because of Petitioner's emotional instability and lack of preparation, Petitioner was not in a condition to testify, and his testimony was "one of the saddest things I have seen in my legal career." (FT. 1731). Moreover, Petitioner had just been found guilty of first degree murder by the same jury that was then considering whether to impose the death penalty, and his only option was to plead for mercy. (*See* Lionel Barrett's testimony on this point where he said that his only strategy at sentencing was based on a "hope" for "mercy." FT.378-9). Petitioner had heard Miller testify that Petitioner was the assailant. Also, Petitioner had every reason to believe that, contrary to the truth, blood was found on his clothes. We know, for example, that when Petitioner was at MTMHI, at least, he was incorrectly told that blood was found on his pants. (FEx. 151, pp. 2-3). Petitioner's trial counsel failed to learn of the blood evidence, and so Petitioner's mistaken impression was never corrected. Petitioner, therefore, had no means of disputing the prosecution's charge that he was the assailant, either to the court or in his own mind. Consequently, the most logical thing for him to do under all of these circumstances would be to admit to the killing in an effort to persuade the jury to spare his life. Under these circumstances, any "confession" that Petitioner may have given cannot be regarded as any kind of reliable account of what actually happened. *Cf. Herman v. Claudy*, 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126 (1956) (courtroom confession by defendant while pleading for mercy is not reliable and therefore not dispositive of defendant's habeas claim).

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION
No. 3: 96-0380

ABU-ALI ABDUR' RAHMAN,
Petitioner,
vs.
RICKY BELL, Warden,
Respondent

RESPONSE IN OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(B)

Petitioner has moved, pursuant to Fed. R. Civ. P. 60(b), for relief from this Court's judgment, as set forth in its 8 April 1998 Memorandum and Order, *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D.Tenn. 1998), *rev'd on other grounds, aff'd in part and rev'd in part*, 226 F.3d 696 (6th Cir. 2000), *reh'g and suggestion for reh'g en banc denied, cert. denied*, 122 S. Ct. 386 (2001), *pet. for reh'g pending*.[1] He predicates his request upon Tenn. S. Ct. R. 39, issued 28 June 2001. Respondent submits that Tenn. S. Ct. R. 39 does not provide proper justification for relief under Fed. R. Civ. P. 60(b), and that it is improper for petitioner to use Fed. R. Civ. P. 60(b) as a vehicle to disturb the finality of this Court's judgment, as modified.[2] Accordingly, his motion for relief from judgment

[1] On 10 October 2001, petitioner filed a Motion to Withhold Mandate and Grant Rehearing En Banc or Remand for Further Proceedings, in the Sixth Circuit, to which respondent has responded in opposition and to which petitioner subsequently replied. In Part V. of this motion, petitioner advances the argument that rehearing en banc is appropriate because of the intervening promulgation of Tenn. S. Ct. R. 39.

[2] Petitioner has also included in his motion substantive arguments regarding additional habeas claims he alleges should now be considered

should be denied for the reasons set forth herein.[3]

I.

JURISDICTION

Although Fed. R. Civ. P. 60(a) specifically addresses the issue of a district court's jurisdiction over an action while on appeal, Rule 60 (b) is silent in this regard. *Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993). As a general rule, filing a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court. The district court retains jurisdiction only over matters that are in aid of appeal.[4] *Id.* (*citing Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981)). If the district court is disposed to grant a Rule 60 (b) motion filed there, the court may enter an order so certifying, and the moving party may then file a motion in the appellate court to remand the case. *First Nat'l Bank Salem, Ohio v. Hirsch*, 535 F.2d 343, 345-46 (6th Cir. 1976) (per curiam).

II.

PROPRIETY OF A RULE 60(b) MOTION IN A 28 U.S.C. § 2254 PROCEEDING

Petitioner cites to *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001), as authority for this Court to

by this Court as no longer procedurally defaulted in reconsidering its judgment. Respondent submits that such argument is appropriate only when and if this Court agrees that it may, and is so disposed, to entertain the Rule 60(b) motion. Therefore, respondent requests that he be afforded an appropriate period of time to respond to these procedurally defaulted claims if the Court should decide to entertain petitioner's Rule 60(b) motion.

[3] Respondent notes at the outset that the Sixth Circuit has granted a Certificate of Appealability in another case on the following issue: "[W]hether, in light of Tennessee Supreme Court Rule 39, as amended June 28, 2001, Adams procedurally defaulted claim (7) . . .," *Adams v. Holland*, No. 00-6575 (6th Cir. Aug. 16, 2001) Certificate of Appealability granted (copy attached).

[4] Because the mandate has not issued from the Sixth Circuit, it is respondent's position that this case is still on appeal.

entertain a Rule 60(b) motion in a federal habeas proceeding brought by a state prisoner. However, the Sixth Circuit has stated that "[w]e agree with those Circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition. . . ." *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), *reh'g and suggestion for reh'g en banc denied, cert. denied sub. nom., McQueen v. Parker*, 520 U.S. 1257, 117 S. Ct. 2422, 138 L.Ed.2d 185 (1997); *accord United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998), *cert. denied*, 526 U.S. 1011, 119 S. Ct. 1156, 143 L.Ed.2d 221 (1999); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (*en banc*); *Felker v. Turpin*, 101 F.3d 657, 660-61 (11th Cir. 1996) (*per curiam*); *United States v. Hernandez*, 158 F.Supp.2d 388, 391 (D.Del. 2001).[5]

Even if this Court were to find that the terms of the AEDPA's limitations on second or successive applications, 28 U.S.C. § 2244(b), do not govern this case, it "must be guided by the general principles underlying [the Supreme Court's] habeas corpus jurisprudence." *Calderon v. Thompson*, 523 U.S. 538, 554, 118 S. Ct. 1489, 1500, 140 L.Ed.2d 728 (1998). Because of "'the profound societal costs'" attendant with the exercise of habeas jurisdiction, the Court has imposed significant limitations on the federal courts' ability to grant habeas relief. *Id.* at 555. Those limitations are based on the Court's "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system.'" *Id.* When lengthy federal proceedings have run their course and a mandate denying relief should have, by all rights, issued, *see* Fed. R. App. P. 41(d)(2)(D), finality acquires an added moral

[5] *McQueen* went on to state that such a motion would be subject to a cause and prejudice analysis, which was the old standard under the abuse of the writ doctrine. Second and successive habeas petitions must now meet the criteria of 28 U.S.C. § 2244 (b) and be decided upon by the Circuit Court of Appeals.

dimension, because "[o]nly with an assurance of real finality can the State execute its moral judgment," allowing victims to move forward with their lives. *Id.* at 556. "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty.'" *Id.*

Therefore, the proper procedure would be to transfer the matter to the Sixth Circuit for their determination of whether petitioner's Rule 60(b) motion satisfies the gateway criteria of 2244 (b).

III.

TENN. S. CT. R. 39 DOES NOT HAVE RETROSPECTIVE APPLICATION

Tennessee Supreme Rule 39 reads as follows:

> In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power. Tenn. R. App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.
>
> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to

petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

"Statutes, regulations, and rules of court must be read in a "straightforward" and "commonsense" manner." *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997); *cf. Duncan v. Walker*, 531 U.S. 991, ____, 121 S. Ct. 2120, 2124-25, 150 L.Ed.2d 251 (2001) (statutory construction begins with language of statute, with duty to give effect, if possible, to every clause and word); *Seals v. State*, 23 S.W.3d 272, 276 (Tenn. 2000) (basic principle of statutory construction is to ascertain and give effect to legislative intent, without unduly restricting or expanding intended scope).

Petitioner relies on Rule 39 for the proposition that it applies retrospectively to remove discretionary appeal to the Tennessee Supreme Court from the state review process. Respondent submits, however, that Rule 39 does not apply retrospectively.

First, if the Tennessee Supreme Court intended for Rule 39 to have retrospective application it could have clearly and

unambiguously said so. It did not.

Second, a careful reading of Rule 39 shows that the operative word is "shall," a word clearly and unambiguously signaling future conduct, *e.g.*, "a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal. . .," and, "the litigant shall be deemed to have exhausted all available state remedies. . ." The only significance of the July 1, 1967 date mentioned is that this is the date that the Court of Criminal Appeals was created.

Third, it is helpful to look at the standards applied by the Tennessee courts in order to determine whether or not a new rule, statute or other rule of law will be given retrospective application.

With regard to statutes, they do not operate retrospectively unless it is so provided in the statute. "However, statutes dealing with matters of procedure or remedy are generally held to be applicable to proceedings after enactment even though the facts occurred prior to enactment. *Mangrum v. Wal-Mart Stores, Inc.*, 950 S.W.2d 33, 37 (Tenn. App. 1997). Where there is a new law changing a rule of practice, the new rule is applicable to all cases then pending in the state system. *Frame v. Marlin Firearms Company, Inc.*, 514 S.W.2d 728, 730 (Tenn. 1974).

Even when imprisonment or a death sentence are at issue, most changes in the law, including those of constitutional dimension, do not affect judgments that became final before the change occurred. *See, e.g., Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Petitioner's case has been final so far as the state system is concerned since 10 June 1991.

Furthermore, as discussed *infra*, the apparent benefits sought through enactment of Rule 39 cannot be achieved through retrospective application, rendering such application meaningless, because individuals such as petitioner cannot return to state court.

IV.

TENN. S. CT. R. 39 MAY NOT EXPRESSLY DIRECT FEDERAL COURTS TO DEEM CLAIMS EXHAUSTED

Even if this Court disagrees with respondent and finds that the Tennessee Supreme Court meant for Tenn. S. Ct. R. 39 to apply retrospectively, that intention is not binding on the federal courts. It is the federal courts, not the state courts, that must determine whether "available" remedies have been "exhausted" in the state courts before the federal courts can hear a claim. As such, the Supremacy Clause prevents Rule 39 from being so directive to the federal courts. *Mattis v. Vaughn*, 128 F.Supp.2d 249, 259 (E.D. Pa. 2001).[6]

To interpret Rule 39 as petitioner does would have the effect of saying that, even though Sixth Circuit and Supreme Court precedent make seeking discretionary review mandatory for exhaustion in the absence of such an order or rule, *see O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S.Ct. 1728, 1731, 144 L.Ed.2d 1 (1999); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990), this Court is now required to treat such review as not having been available in the past. This too, would be a Supremacy Clause violation. *Mattis v. Vaughn*, 128 F.Supp.2d at 261. In other words, Rule 39 would be an attempt by the Tennessee Supreme Court to rewrite history by directing the federal courts to treat the Tennessee system as never having required Tenn. R. App. P. 11 applications to the Tennessee Supreme Court for discretionary review. *See Wenger v. Frank*, 266

[6] Furthermore, Tenn. S. Ct. R. 39 raises a serious separation of powers question under the Tennessee Constitution. All legislative authority is vested in the General Assembly. Tenn. Const. art. II, § 3. The courts are expressly forbidden by the constitution from exercising any of the powers belonging to the legislative department. Tenn. Const. art. II, § 2; *Ballentine v. Mayor of Pulaski*, 83 Tenn. 633 (1885).

F.3d 218, 226 (3rd Cir. 2001).[7]

Respondent submits that the only constitutional interpretation of Tenn. S. Ct. R. 39 is one reading the Rule as a statement that, effective immediately, the ordinary appeals process in Tennessee no longer necessarily includes Tenn. R. App. P. 11 applications.

V.

OTHER VALID, PRACTICAL CONSIDERATIONS

Even if the Supremacy Clause problem did not exist, there are other, valid reasons why Tenn. S. Ct. R. 39 should not be applied retrospectively.

First, the purpose of Rule 39 is to discourage petitions for discretionary review under Tenn. R. App. P. 11. "Permission to appeal will be granted. . . only where special and important reasons justify the exercise of that discretionary review power." Tenn. S. Ct. R. 39. As such, Rule 39 is not designed to benefit state prisoners seeking to litigate claims that were previously procedurally defaulted in federal court. Rather, the obvious purpose is an attempt by the Tennessee Supreme Court to control its docket. Such a purpose is not served by retrospective application of Rule 39. Any docket relief for the Tennessee Supreme Court could be prospective only. *See Wenger v. Frank*, 266 F.3d at 225.

Second, making Rule 39 retrospective would serve only to greatly increase the burden on federal courts without providing any additional relief to the Tennessee Supreme Court. It begs the obvious to note that, over the years, numerous habeas claims have been denied because they were procedurally defaulted due to a petitioner's failure to raise

[7] Indeed, the preamble to Tenn. S. Ct. 39 itself contains a tacit admission of the recognized state of the law on exhaustion of state remedies regarding the need to file a Tenn. R. App. P. 11 application wherein the court states that, "criminal and post conviction relief litigants routinely petitioned" for Rule 11 relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation."

them to the Tennessee Supreme Court. To accept petitioner's position, every habeas corpus decision since 1 July 1967, wherein procedural default was enforced because a petitioner failed to exhaust state remedies through Rule 11 application to the Tennessee Supreme Court, would be subject to reopening even where, as here, judgment is final.

Third, there can be no serious argument that petitioner has relied upon the newly-created provisions of Rule 39 to his detriment, although this would be a legitimate concern for the federal courts in regard to Rule 39's prospective application. *See O'Sullivan v. Boerckel*, 562 U.S. at 862 (Stevens, J., dissenting) (federal courts should not find procedural default where state prisoner has relied to his detriment on state supreme court's explicit statement that he need not present every claim to it in order to exhaust state remedies).

VI.

PETITIONER'S RELIANCE ON FED. R. CIV. P 60(b)(6) IS INAPPROPRIATE

Fed. R. Civ. P. 60(b) provides six grounds under which a party may seek relief from a judgment or order. It appears from a plain reading of the Rule and petitioner's motion that he seeks to travel under the sixth ground: "any other reason justifying relief from the operation of the judgment."

"Rule 60(b) should apply only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.'" *Olle v. Henry & Wright Corporation*, 910 F.2d 357, 365 (6th Cir. 1990), *reh'g denied*. It is invoked only in those "unusual and extreme situations where principles of equity mandate relief." *Id.* (emphasis in original). Rule 60 (b) (6) exists to allow courts to vacate judgments whenever such action is appropriate to accomplish justice in extraordinary circumstances. *Klapprott v. United States*, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949). Accordingly, respondent submits that even petitioner's proffered reason, the retrospective application of Rule 39, does not meet this criteria. Petitioner could not have

relied on the substance of this rule to his detriment because, at the time of petitioner's travel through the state court review process, the well-established law in this Circuit required exhaustion through the highest state court.

Furthermore, Rule 60(b) incorporates the concept of lack of fault on the part of a petitioner. Here, where petitioner, knowing what the law of this circuit was regarding exhaustion, purposely sought Rule 11 relief as to some claims, but not others, he should not now be heard to complain. *Burke v. United States*, 1999 WL 1065217 (E.D.Pa. 1999) (copy attached). Free, calculated, deliberate choices are not appropriate for Rule 60(b) (6) relief. *Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1076 (7th 1997).

VII.

CONCLUSION

Based upon the foregoing, respondent respectfully requests that petitioner's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) be transferred to the Sixth Circuit Court of Appeals as a second or successive petition, or that it be denied outright.

Respectfully submitted,
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: ORDER ESTABLISHING RULE 39, RULES OF THE SUPREME COURT OF TENNESSEE: EXHAUSTION OF REMEDIES [*APPENDIX B TO PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(B)].*

In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power, Tenn. R App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated. below.

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> claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

FOR THE COURT:
Riley Anderson, Chief Justice

Supreme Court, U.S.
FILED
JUL 10 2002
CLERK

(8)

No. 01-9094

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONER ABU-ALI ABDUR'RAHMAN

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in holding, in square conflict with decisions of this Court and of other circuits, that every Rule 60(b) Motion constitutes a prohibited "second or successive" habeas petition as a matter of law.

2. Whether a court of appeals abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a habeas petitioner from ever receiving any adjudication of his claims on the merits.

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OPINIONS BELOW

The two orders of the district court transferring petitioner's Rule 60(b) motion to the court of appeals and holding that the district court lacked jurisdiction to issue a certificate of appealability are unpublished and set forth at J.A. 40-44. The Sixth Circuit's judgments denying petitioner relief on his Rule 60(b) motion and his motion to amend the judgment and remand his prior appeal are embodied in a single unpublished order set forth at J.A. 38-39, which incorporates a prior unpublished order set forth at J.A. 35-37. The district court's prior opinion vacating petitioner's death sentence is published at 999 F. Supp. 1073 (1998) and set forth at J.A. 45-100. The Sixth Circuit's divided opinion reversing is published at 226 F.3d 696 (2000) and set forth at J.A. 101-151.

JURISDICTION

The court of appeals entered its order February 11, 2002. The petition for certiorari was filed March 18 and granted April 22. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND RULES INVOLVED

This case involves 28 U.S.C. § 2244(b); Federal Rule of Civil Procedure 60(b); Tennessee Rule of Appellate Procedure 11(a); and Tennessee Supreme Court Rule 39. All are set forth in Appendix A.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE STATE COURTS

1. In July 1987, petitioner Abu-Ali Abdur'Rahman (formerly James Lee Jones) was convicted in a Tennessee state court for first-degree murder, assault with intent to murder, and armed robbery. The jury and the state courts found that he and his co-defendant, Devalle Miller, went to the apartment of Patrick Daniels, a Nashville drug dealer, with intent to rob Daniels. J.A. 48. The two men entered the apartment and bound Daniels and his girlfriend, Norma Norman, with duct tape. Daniels was stabbed six times with a butcher knife taken from

the kitchen; four of the stabs penetrated his heart and caused a large amount of blood to splatter on the walls and nearby objects; he died of these wounds. *Id.* 103. Norman was also stabbed several times in the back, but she survived. *Id.* 103.

At the sentencing phase of the trial, the prosecuting attorneys contended that petitioner had been "the sticker" (T.T. 1983), the knife-wielder, who killed Daniels "four different times" (T.T. 1939). They relied on co-defendant Miller's testimony as a prosecution witness to this effect, assuring the jury that "Miller told you the truth" (T.T. 1944). In aggravation, they presented evidence of prior convictions for assault with a deadly weapon and for killing a fellow inmate in a federal reformatory (T.T. 1808-23). The jury found three aggravating circumstances—petitioner had prior violent felony convictions; Daniels' murder was especially heinous, atrocious, and cruel; and it was committed during a robbery—and sentenced petitioner to death. Petitioner's conviction and death sentence were affirmed on direct appeal. *State* v. *Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990).

2. The issues now before this Court arise out of evidence, first presented by petitioner in state and federal postconviction proceedings, that the prosecution knowingly used false testimony by Devalle Miller, other deliberately misleading fabrications, and a calculated strategy of concealment and deceit, to get a death sentence by covering up "weaknesses"[1] in the prosecution's case for death. Prosecutor John Zimmermann's multiple acts of misconduct implementing this strategy are too numerous to describe here; they are summarized at pages 10-24 below. The rest of this Statement recounts the course of postconviction proceedings bearing on the procedural question whether—as the Sixth Circuit ultimately held—petitioner is now barred from federal habeas corpus consideration of his prosecutorial misconduct claims.

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[1] The quotation is from a pretrial intra-office report by Zimmermann, acknowledging the weaknesses.

3. Petitioner first sought state postconviction relief, raising federal constitutional claims including ineffective assistance of counsel, prosecutorial misconduct, and unconstitutional jury instructions. The trial court rejected each of these claims.

Petitioner appealed as of right to the Tennessee Court of Criminal Appeals, presenting the same federal constitutional claims. That court rejected petitioner's prosecutorial misconduct claims, concluding that the evidence withheld by the prosecution was not "favorable to the defense." *Jones* v. *State*, CCA No. 01C01-9402-CR-00079, 1995 Tenn. Crim. App. LEXIS 140, at *7 (Tenn. Crim. App. Feb. 23, 1995). Rejecting his other claims as well, the court affirmed denial of postconviction relief.

4. There is no appeal as of right to the Tennessee Supreme Court in postconviction matters. Beyond the Court of Criminal Appeals, the only possibility for review is controlled by Tennessee Rule of Appellate Procedure 11(a) ("TRAP 11"), under which the Supreme Court may grant leave to "appeal by permission." Pursuant to TRAP 11, petitioner's counsel applied for leave to appeal on the basis of petitioner's claims of ineffective assistance and a subset of prosecutorial misconduct claims. The Tennessee Supreme Court denied the application (*Jones* v. *State*, No. 01C01-9402-CR-00079 (Tenn., filed Aug. 28, 1995)), and this Court denied certiorari (516 U.S. 1122 (1996)).

II. INITIAL PROCEEDINGS IN THE FEDERAL COURTS

1. On April 23, 1996, petitioner filed a federal habeas corpus petition. As amended, his petition asserted that he had received ineffective assistance of counsel; that the jury was instructed unconstitutionally at sentencing; and that the integrity of the sentencing phase of the trial was undermined by serious prosecutorial misconduct.

The district court declined to consider the bulk of petitioner's prosecutorial misconduct claims because they had not been presented to the Tennessee Supreme Court in a request for

leave to appeal from the Court of Criminal Appeals on postconviction review and thus were not exhausted for purposes of 28 U.S.C. § 2254(c). J.A. 53-54. Because the time to seek permission to appeal those claims to the Tennessee Supreme Court had passed, the district court did not dismiss the claims without prejudice and remit petitioner to the state courts. Instead, it held the claims procedurally defaulted (J.A. 60) and proceeded to the merits of his other issues.

The district court rejected petitioner's challenge to the jury instructions (J.A. 69) and his claim of ineffective assistance of counsel at the guilt phase of his trial (J.A. 86-87). It upheld his claim of ineffective assistance of counsel at the sentencing phase. JA 87-100. The latter holding was based upon extensive findings made after an evidentiary hearing held over respondent's objection. *Id.*

2. Respondent appealed to the Sixth Circuit on grounds that challenged only the district court's power to go beyond the state court record or to find sentencing-phase prejudice *without* going beyond the state court record. Petitioner cross-appealed, challenging the district court's conclusions with respect to the jury instructions and the district court's finding that he had not been prejudiced by his counsel's deficient performance at the guilt phase of his trial. J.A. 122, 127, 130.

A panel of the Sixth Circuit rejected every contention made by the parties. On respondent's appeal, it held that the district court did not lack discretion to conduct an evidentiary hearing. J.A. 114-118, 143-144. A two-judge majority also rejected petitioner's claims on his protective cross-appeal. J.A. 123, 127, 130. The same majority then *sua sponte* reversed the district court's finding that petitioner had been prejudiced at sentencing by his lawyer's ineffective assistance, and it vacated the judgment setting aside his death sentence. *Id.* 134.

Petitioner's motion for rehearing and suggestion of rehearing *en banc* were denied. The Sixth Circuit did grant a stay of its mandate to permit petitioner to seek certiorari. Thus, the

case was never remanded to the district court, and no final judgment adverse to petitioner was entered in the district court.

3. On May 21, 2001, petitioner filed a petition for certiorari ("the 2001 Certiorari Petition"). He sought review of the Sixth Circuit's election to address the issue of prejudice *sua sponte*, of the substance of the Sixth Circuit's no-prejudice ruling, and of the Sixth Circuit's rejection of his protective cross-appeal with respect to his jury-instruction claim. This Court denied certiorari. 122 S. Ct. 386 (2001).

III. PROCEEDINGS RELATING TO TENNESSEE SUPREME COURT RULE 39

1. While petitioner's case was being briefed in the Sixth Circuit, this Court decided *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999), holding that 28 U.S.C. § 2254(c) requires "state prisoners to file petitions for discretionary review when that review is part of the ordinary appellate review procedure in the State." 526 U.S. at 847. The principal interest protected by § 2254(c), the Court explained, is comity, which dictates "that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Id.* at 845. The Court recognized that its rule could create an "increased burden [that] may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court," but "note[d] that nothing in [its] decision . . . requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable." *Id.* at 847.

"[I]n response to *O'Sullivan*" (TRAP 11 Adv. Cmte. Comment), the Tennessee Supreme Court adopted that Court's Rule 39 ("TSCR 39") on June 28, 2001, while petitioner's 2001 Certiorari Petition was pending. TSCR 39 explicitly "clarif[ies]" existing law and applies to "all appeals from criminal convictions or post-conviction matters from and after July

1, 1967"—the date on which the state's Court of Criminal Appeals was created and when TRAP 11 went into effect. TSCR 39 provides:

> [A] litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all state remedies available for that claim.

As set forth in the TRAP 11 Advisory Committee Comments, the purpose of TSCR 39 is to make clear that a discretionary application for review in Tennessee is not an available remedy of the sort contemplated by the holding in *O'Sullivan* "that in order to satisfy the exhaustion requirement of collateral federal review under 28 U.S.C. § 2254, a state prisoner must present his or her claims to the state supreme court for discretionary review absent a state court rule or decision to the contrary." TRAP 11 (Adv. Cmte. Comment).

2. Immediately after this Court denied certiorari, petitioner called the lower federal courts' attention to TSCR 39 and moved to pursue the claims that the district court had held unexhausted without the benefit of the clarification of Tennessee law effected by TSCR 39:

a. On the day this Court denied certiorari, petitioner moved the Sixth Circuit to modify its judgment and remand the case to permit the district court to consider the effect of TSCR 39 on the district court's earlier decision.

b. Petitioner also sought relief in the district court. Fed. R. Civ. P. 60(b) permits a court to "relieve a party . . . from a final judgment" under certain circumstances. In petitioner's case, no final judgment had been entered and the case was still pending

in the court of appeals, which had not yet entered its mandate following the denial of certiorari. Sixth Circuit precedent, however, permits a party to seek relief in district court under Rule 60(b) while a case is pending on appeal. The district court may consider a Rule 60(b) motion and, if inclined to grant the motion, issue an opinion inviting the court of appeals to remand the case. See *First Nat'l Bank of Salem* v. *Hirsch*, 535 F.2d 343, 346 (CA6 1976).

Within forty-eight hours of this Court's order denying certiorari, petitioner secured a status conference to advise the district court that a Rule 60(b) motion would be promptly filed to address the impact of TSCR 39 upon petitioner's prosecutorial misconduct claims. Soon thereafter, petitioner filed the motion, raising only those claims that had been contained in petitioner's initial habeas application and that the district court had held unexhausted.

The district court concluded that it could not consider the motion because it was bound by Sixth Circuit precedent holding that a "Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive [habeas] petition." J.A. 40. Pursuant to Sixth Circuit protocol, the district court transferred the motion to the court of appeals for that court to apply the gatekeeping criteria of 28 U.S.C. § 2244(b)(1) and (2). J.A. 40.

3. In two summary orders, the Sixth Circuit denied petitioner the benefit of TSCR 39. It held that the district court had correctly treated petitioner's Rule 60(b) motion as a "second or successive" habeas application. It therefore ruled that the Rule 60(b) motion must be "dismissed" as raising only claims that were "presented in a prior application." See 28 U.S.C. 2244(b)(1). J.A. 35 (Order of Jan. 18, 2002). Finally, the Sixth Circuit rejected petitioner's request that it amend its judgment

to permit the district court to consider TSCR 39. J.A. 38 (Order of Feb. 11, 2002).[2]

SUMMARY OF ARGUMENT

Petitioner's claims of prosecutorial misconduct are based upon evidence of a shocking course of conduct deliberately pursued by prosecuting attorney Zimmermann with the aim of hiding acknowledged "weaknesses" in the prosecution's case for death by suppressing some facts and falsifying others to produce a deceptive and grossly inaccurate picture of petitioner's culpability. These are flagrant violations of due process that a federal court is obliged to rectify in habeas corpus proceedings if the state courts do not, and if a habeas petitioner has properly exhausted state remedies.

The district court below initially failed to adjudicate these claims on the merits because it believed that petitioner had *not* exhausted his state remedies. That conclusion was based upon a misunderstanding of state postconviction procedure which has since been dispelled through an unmistakably clear declaration of Tennessee law by the state's highest court, acting in its rulemaking capacity. The rule was promulgated to clarify that applications for permission to appeal to the Tennessee Supreme Court are not properly sought simply for federal exhaustion purposes, because the Tennessee Supreme Court's discretionary jurisdiction is reserved for issues of general importance and is not available for routine postconviction review. As a clarification of existing law, the rule was explicitly made applicable to cases like petitioner's, which had previously been processed through the state's postconviction procedure. It establishes beyond cavil that petitioner *did* exhaust all available state remedies for his federal claims.

[2] The Sixth Circuit decided petitioner's Rule 60(b) motion as an original matter because the motion had been transferred by the district court. Petitioner had sought review in the Sixth Circuit in three further ways: he noticed an appeal to the Sixth Circuit; he sought a certificate of appealability from the district court (which held that it lacked jurisdiction to grant the certificate because the motion had already been transferred to the court of appeals (J.A. 40)); and he sought a certificate of appealability from the court of appeals. The Sixth Circuit concluded that no appeal would lie because the motion had been transferred rather than decided by the district court. See J.A. 38. The petition for certiorari asserts jurisdiction over all of the Sixth Circuit's rulings.

The courts below erred in refusing to take account of this clarification of state law when petitioner promptly brought it to their attention and, in light of it, sought an adjudication of the merits of his previously presented but unadjudicated prosecutorial misconduct claims. The Sixth Circuit's sole ground for the refusal was that petitioner's motions—one to the district court for relief from judgment under Fed. R. Civ. P. 60(b), the other to the court of appeals for a remand before issuance of its appellate mandate—were "second or successive habeas corpus application[s]" raising a previously presented claim and therefore were subject to the mandatory-dismissal rule of 28 U.S.C § 2241(b)(1). This is dead wrong for two independently sufficient reasons. *First*, motions like petitioner's, made in a habeas proceeding filed before AEDPA's effective date, are not governed by AEDPA. *Second*, petitioner's renewed request for *one and only one* federal adjudication of claims not previously determined on the merits would not be a "second or successive habeas corpus application" within § 2241(b)(1) even if AEDPA applied. *Lindh* v. *Murphy* squarely controls the first point; *Stewart* v. *Martinez-Villareal* and *Slack* v. *McDaniel* control the second.

Petitioner is now entitled to have his prosecutorial misconduct claims heard on the merits. Because his habeas case had not yet gone to final judgment but was still pending on appeal when the Tennessee Supreme Court clarified Tennessee law, petitioner comes within the rule that an appellate court's mandate ought not to flout the law as it is clearly understood at the time the mandate issues. And independently of this, his prompt motion for relief from a now demonstrably misinformed nonexhaustion ruling—a ruling that the Tennessee Supreme Court has clarified not only serves no state interest but *disserves* Tennes-

see's interest in the proper functioning of its postconviction process—brings his compelling due process claims within the proper ambit of Rule 60(b)'s corrective office.

ARGUMENT

I. THE RULINGS BELOW EQUATING PETITIONER'S MOTIONS FOR RELIEF FROM THE LOWER COURTS' JUDGMENTS WITH SUCCESSIVE HABEAS APPLICATIONS FORECLOSE FEDERAL REVIEW OF A COMPELLING CASE OF DENIAL OF DUE PROCESS THROUGH DELIBERATE PROSECUTORIAL FALSIFICATION AND SUPPRESSION OF EVIDENCE CRITICAL TO A FAIR SENTENCING DETERMINATION.

The record establishes the following facts, discovered only after trial, about Assistant District Attorney General John Zimmermann's concealment of information and deceitful manipulation of evidence in an all-out effort to obtain a death sentence against petitioner:[3]

1. Zimmermann knew very well from the outset that—as he testified below—Nashville jurors are "tougher to get death sentences from" than other Tennessee jurors. H.T. 905. They will not impose death verdicts unless, in Zimmermann's words, they can be "sure beyond a shadow of a doubt that the person the state is seeking the death penalty on was in actuality responsible for the murder." *Id.* To get the death penalty, the defendant must be "the shooter or the sticker." H.T. 907. Even then, "you

[3] The evidentiary record on this issue is complete, but no findings were made by the state courts (which denied the prosecutorial misconduct claims on the merits without comment) or the district court (which declined to consider most of the claims). Here, we summarize what the district court could properly find from the record.

For documentation of Assistant District Attorney General John Zimmermann's extensive history of serious misconduct as a prosecutor, including repeated findings by courts and disciplinary officials that his actions violated basic ethical standards and constitutional norms, see Brief of *Amici Curiae* Former Prosecutors James F. Neal et al. See also J.A. 254-260.

. . . have to explain everything to the jury" about aggravation and the absence of mitigation. "They want that comfort." H.T. 905. To give the jurors comfort on each of these points in petitioner's case, Zimmermann relied upon factual misrepresentation and concealment.

2. In a March 24, 1987 intra-office report, Zimmermann listed several "Weaknesses in [the] Case" for "seek[ing the] death penalty." The only neutral witness, the surviving victim Norma Norman, was blindfolded and "did not actually see" who stabbed the deceased or herself. H. Ex. 42. The only other witnesses to the stabbing were petitioner and the co-defendant Devalle Miller, and "co-defendants . . . always want to point the finger at each other." *Id.*; H.T. 912. The finger could not convincingly be pointed at petitioner because, during the incident, he wore what Ms. Norman called a full-length, black "gangster coat" (T.T. 1332-33, 1334, 1342-43),[4] and the "T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by [petitioner]." H. Ex. 42; see H. Ex. 9A. Zimmermann recognized that, because "[p]hotographs of the decedent's house show blood spattering all over the kitchen" where the killing took place, "if the defendant did wear his coat . . . *he obviously was not present when the stabbing occurred.*"[5]

Zimmermann was left in no doubt on this last point, in light of:

- The autopsy, showing that Patrick Daniels was killed by four stab wounds to the heart, one piercing the aorta—a vessel "about the size of a garden hose" that "carries blood from the heart to . . . the body"—and another piercing an "artery carrying blood to the . . . heart." H. Ex. 16; T.T. 1659.

[4] Police seized the "long black coat" at petitioner's home shortly after the incident. H. Ex. 12, at 485.

[5] H. Ex. 42 (emphasis added). In his testimony below, Zimmermann explained that "when you have a murder with this much blood splatter, you would think some would have gotten on the defendant." H.T. 917.

- Police reports by lead Detective Mark Garafola and others "observ[ing] a large amount of blood splattering on items near the victim [and] on the walls, bar, and divider." H. Ex. 1-4.
- Consultation with Detective Garafola (see H. Ex. 110, at 19), who reasoned that the blood splattering occurred following each blow to the heart. H. Ex. 110, at 42-43 ("there was more than one wound and after the first one there probably was blood spurting out of the first wound or the second wound, and if you hit the second or third time it would cause it to splatter").[6]

Given this evidence, Zimmermann realized that there were two, and only two, possible versions of what happened. "Either the defendant removes his coat before he began to stab these people . . . or if the defendant did wear this coat the entire time he obviously was not present when the stabbing occurred." H. Ex. 42. The prosecution's case for death depended on establishing the first of these two scenarios and excluding the second. But then Devalle Miller was apprehended and complicated

[6] Below, Georgia's Chief Medical Examiner, Dr. Kris Sperry, confirmed that each of the four stab wounds to the heart "would have resulted in immediate blood coming forth profusely from the stab wound itself," turning into a "spray" with "each beat of the heart"; that each time the knife was "pulled back," "cast-off" blood would "spray . . . into the immediate environment"; and that additional spray would be caused by "each subsequent" blow to the chest, causing blood "splatter to the area, the hand, the knife, clothing that is on . . . like striking a wet sponge." H.T. 37-39, 77. As a result, any assailant squatting over the prone victim and stabbing him four times in the heart "would have had blood from those wounds transferred to his . . . clothing," particularly, "smears . . . droplets and splatters . . . [c]lustered around the sleeve area of whatever hand was holding the knife." H.T. 37, 77. Dr. Sperry testified that the tests the Tennessee Bureau of Investigation used to examine the coat were extremely sensitive and would find any trace of blood that was present; and that blood stains cannot be washed or dry-cleaned out of wool sufficiently to escape detection without destroying what was, in fact, an intact coat. H.T. 35-36, 59-61.

Zimmermann's task immeasurably by making him aware that the first scenario simply was not true.[7]

3. When Miller was initially questioned about the killing, he gave Zimmermann and Garafola a three-hour oral confession in which he admitted taking part in the assault but blamed the stabbing on petitioner. See H. Ex. 51; T.T. 1612-14. As did Ms. Norman, Miller repeatedly and consistently placed petitioner in the long black coat at the scene.[8] According to Miller's narrative recounting of the events in his confession, as Zimmermann recorded them in his report, petitioner at no time removed the long black coat.[9] Miller's statement tracked the other evidence available to Zimmermann. In a recorded statement to police shortly after the events, Norma Norman's daughter Shonta told them she had "peeped" out of her bedroom into the kitchen on one occasion—after the victim was stabbed but before he died—and *at that crucial moment, petitioner (the "light skinned" man in "glasses") "had on a wool coat."*[10] Moreover, because there was no blood on petitioner's pants or shoes, which were seized along with his coat, it was altogether unlikely that he had stabbed the victim with or without the coat on. H. Ex. 9A, 12, 16.

[7] Miller fled Nashville after the killing. He was captured in Pennsylvania 14 months later. T.T. 1487, 1605. Petitioner remained in Nashville and was arrested at his job two days after the killing. H. Ex. 110, at 53-59.

[8] Norma Norman: H. Ex. 4; T.T. 1332, 1333, 1334, 1342-43, 1348, 1364, 1366-67. Devalle Miller: H. Ex. 51 (at 160-61); T.T. 1451, 1454-55, 1462.

[9] H. Ex. 42. Although this part of Miller's oral confession is tracked and described in Zimmermann's report, Zimmermann omitted it from an hour-long videotaped interview of Miller that he conducted shortly after the three-hour oral statement. See T.T. 1612-14; H. Ex. 51. The taped interview was turned over to the defense as *Jencks* material, but Zimmermann's report (H. Ex. 42) was suppressed. Zimmermann's report is Appendix B to this brief.

[10] H. Ex. 6. Norma Norman described hearing the assault on Patrick Daniels and moments later hearing him choking on his blood. T.T. 1376-78; H. Ex. 5. Shonta describes "peep[ing]" at the latter point. H. Ex. 6.

Still, Zimmermann was not without resources. When invited to explain how petitioner could have stabbed the victim four times in the heart and come away with no blood on his clothes (see H. Ex. 42), "Miller stated that the stabbing of the deceased did not produce the blood that was spattered, but that the blood that was splattered occurred as the deceased gasped for air after the defendant had gone to the second victim and begun to stab her." H. Ex. 42. This tale of Miller's depended on a premise—that no blood had splattered from Daniels' wounds during the repeated stabbings—which Zimmermann and Detective Garafola knew to be false, given the nature and number of wounds and the blood shower each wound precipitated. But the tale was enough for Zimmermann to run with if he could conceal its lameness.

4. In sentencing-phase summation, the prosecuting attorneys conceded that "*the main issue in this case was who was the sticker, who wielded that knife.*" T.T. 1944. To satisfy a skeptical jury on this point despite what Zimmermann knew, he systematically suppressed the truth and misrepresented the facts:

- Despite discovery motions concededly obliging Zimmermann (in his words) to turn over "anything favorable to the defendant," Zimmermann admittedly decided to withhold: (1) all police reports describing the "large amount of blood splattering on the items near the victim . . . on the walls, bar and divider" (H. Ex. 1-4); (2) his own report concluding that unless petitioner took off his coat, "he obviously was not present when the stabbing occurred" and describing Miller's oral statement that dodged this dilemma by recounting the incredible tale "that the stabbing . . . did not produce the blood that was spattered" (H. Ex. 42); and (3) Shonta Norman's statement that petitioner "had on a wool coat" moments *after* the victim was stabbed (H. Ex. 6). H.T. 903-04, 926-27, H. Ex. 41, 11, 60-63.
- Six months before Miller's confession revealed the significance of petitioner's blood-free clothes, Zimmermann had given petitioner's original lawyer (Neal McAlpin) a copy of the lab report finding no blood on the coat, pants, or shoes. H. Ex. 19. But *after* Miller's confession, when Lionel Barrett replaced McAlpin and again asked for the forensic reports (H. Ex. 39, 41, 63), Zimmermann withheld the blood report (H.T. 930-31), giving Barrett instead an inconclusive report about soil found on petitioner's pants and in the victim's yard (H. Ex. 62). Barrett thus never knew that a large amount of blood splattering was found near the victim's body, nor that petitioner's clothes tested negative for blood (H.T. 292). Tellingly, the prosecutors realized—and remarked to Miller's lawyer at the beginning of trial—how surprisingly little Barrett knew about the facts of the case.[11]
- Zimmermann called Miller to testify to what Zimmermann (and lead Detective Garafola) knew was "obviously" untrue—that petitioner *both* wore the black coat *and* "squatted over [the victim] stabbing him," and that the blood splattered only after the stabber had "backed up off the

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[11] See H.T. 1040-41 (prosecutor Barnard "mentioned that he was surprised how little Mr. Barrett knew or was aware of"; ruled hearsay as to what Barrett knew but not as to what the state knew). Petitioner had also been misinformed on the point. After his arrest, staff members of the mental health facility where he was sent for evaluation told him based on false statements by police that clothes found at his home had blood stains on them. See H. Ex. 151 (at 2), 110 (ex. 77), 42.

The district court ruled (1) that Zimmermann's failure to give Barrett the blood report was not improper because the state had given McAlpin the report (instead, Barrett was ineffective for not getting the file from McAlpin) (J.A. 77, 83); and (2) that Barrett's failure to retrieve the report from McAlpin deprived petitioner of a "good argument" but was not by itself prejudicial at the *guilt* phase – in part because of the possibility that petitioner took off the coat. *Id.* 64. The district court's rulings as to guilt-phase ineffective assistance do not resolve petitioner's claims of sentencing-phase prosecutorial misconduct – particularly because the court refused to consider the suppressed evidence indicating that petitioner wore the coat the whole time.

victim, a couple of feet, and just stood, you know . . . ." T.T. 1451, 1454-55, 1462, 1471, 1472.[12]

- Because "Ms Norman did not actually see [petitioner]. . . stab the deceased" and Zimmermann "needed an eyewitness to the assault," he "recommended . . . that a deal be struck with Mr. Miller." H. Ex. 42; H.T. 912, 932. Miller had been charged with first-degree murder, assault with intent to kill, and armed robbery, carrying a potential death sentence or three consecutive life sentences and a minimum ninety-year term without parole. H. Ex. 44. In a letter to Miller's lawyer *after* trial, Zimmermann described what he had promised "in exchange for" Miller's "agree[ment] to testify against [petitioner]." H. Ex. 92. Miller would be permitted to plead to *two* offenses, "Second-Degree Murder and Armed Robbery," and would receive "*concurrent* sentences" with parole eligibility in *seven and a half years*. H. Ex. 92, 93 (at 8, 47); H.T. 1040-43,1050. But in a formal pleading filed *before* petitioner's trial, Zimmermann described the promise as being only that the state "would not seek the death penalty against Mr. Miller." H. Ex. 67 ("No other promises, inducements, agreements, or otherwise have been made or shall be made to Mr. Miller."). Miller then testified repeatedly at trial that this was the "only promise," and Zimmermann gave color to the lie by telling the jury in closing argument that Miller was "guilty of *first*-degree murder." H. Ex. 67; T.T. 1492-95, 1568-70, 1680 (emphasis added).

[12] Miller testified that he "froze," and petitioner ransacked the living room, "throwing pillows everywhere." T.T. 1467, 1469. Shonta Norman's suppressed statement says it was *Miller* who was "tearing paper and throwing stuff all over the floor and tearing the pillow up." H. Ex. 6. Miller testified that petitioner stabbed the victim in the back while the victim was face down. T.T. 1471-72. The forensic evidence shows "[t]here were no stab wounds involving the back whatsoever"; "there is no evidence at all [that the victim] was ever face down in any way, shape or form." H.T. 48, 41-42, 72-74. Miller testified that the splattering occurred when the victim thrashed wildly, spraying blood "from his nose and mouth." T.T. 1472-73. But see H.T. 42, 57-58 (habeas testimony of Georgia Medical Examiner Sperry: the victim "didn't move appreciably . . . during the course of the stabbing and immediately thereafter"; blood splatter "could not have been produced by blood emanating from the decedent's nose" or mouth; it only "occurred during the course of the infliction of the stab wounds"). For Miller's admission that he repeatedly lied to Zimmermann before trial to keep from "look[ing] more involved," see T.T. 1461, 1504, 1527-28, 1550-51, 1566.

- Finally and most egregiously, having assured the jury that "Devalle Miller told you the truth," Zimmermann and his partner argued explicitly in summation that petitioner did two things that they knew could not both be true: Petitioner "wore that coat . . . that gangster coat" (T.T. 1672-74); and "at his hands—at his enjoyment," he "kills [the victim] four different times" (T.T. 1944, 1939, 1985).

5. Long before petitioner's trial, this Court had unmistakably informed prosecutors that the rule of Due Process requires them to give defense counsel all exculpatory evidence in their files—whether bearing on sentence or guilt. *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963). Their failure to do so violates the Due Process Clause "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the [guilt or sentencing] proceeding would have been different.'" *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)).

Even earlier than *Brady* this Court made it plain as a pikestaff that prosecutors may not constitutionally "contrive[] a conviction" or a capital sentence "through a deliberate deception of the court and jury." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935). This rule bans "the knowing use of false evidence" and "false testimony" (*Napue* v. *Illinois*, 360 U.S. 264, 269 (1959)); advertent misrepresentation of the nature of physical evidence (see *Miller* v. *Pate*, 386 U.S. 1, 7 (1967)); letting "false evidence . . . go uncorrected when" a co-defendant misstates a deal he struck in return for testifying against the defendant (*Giglio* v. *United States*, 405 U.S. 150, 153 (1971)); and letting stand a witness's evident falsehood that a "diligent" defense lawyer would have impeached but the actual lawyer let

pass (see *Giles* v. *Maryland*, 386 U.S. 66, 74 (1967); *id.* at 82 (White, J., concurring)). In any of these situations, "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154 (quoting *Napue*, 360 U.S. at 271).

Assistant District Attorney General Zimmermann did all of these things. He suppressed Devalle Miller's and Shonta Norman's statements to police that petitioner wore the coat the whole time. He suppressed four police reports revealing the "large amount of blood splattering on items near the victim" and thus the importance, in deciding who was the stabber, of garments free of blood. He knowingly exploited defense counsel's lack of diligence in discovering the TBI report establishing that petitioner's coat and clothes were not stained with blood. He presented Miller's testimony that the blood splattering came after the fact from the victim's nose, though both he and his chief detective knew that the splattering "was [from] blood spurting out of the first wound or the second wound [when the knife] hit . . . the second or third time" (H. Ex. 110, at 43), and "obviously" (H. Ex. 42) "would have gotten on the defendant" during the stabbing (H.T. 917). He misrepresented his deal with Miller—a seven-and-a-half-year minimum, in place of what could have been a ninety-year sentence without parole—to the court, defense counsel, and the jury, and he let Miller make the same misrepresentation under oath. In the end, Zimmermann and his partner rested their case for death on the professed truth of two factual propositions that they *knew* could not both be true—that petitioner "had the gangster coat on" (T.T. 1673) and that he killed the victim "at his hands—at his enjoyment" (T.T. 1985).

Zimmermann used each of these deceptive stratagems, believing that his chances of procuring a death sentence hinged upon his ability to persuade the jury beyond any doubt that petitioner was "the sticker." He set about to, and he did, construct the necessary tools of persuasion out of Devalle Miller's falsehoods and his own, while withholding evidence that would

have revealed the truth. Such a course of misconduct undoubtedly could have changed the outcome of petitioner's sentencing trial, and probably would have—or so the district court below could properly find if it is free to consider the merits of petitioner's prosecutorial misconduct claims.

6. Beyond who wielded the knife, there were additional issues of aggravation and mitigation to be resolved by the jury. Zimmermann dealt with these issues as well through suppression and misrepresentation.

a. The most important aggravating circumstance (see J.A.120) was petitioner's 1972 conviction for killing a fellow inmate at a federal reformatory. Outside of court, Zimmermann repeatedly expressed concern that the aggravating potential of this incident would be diminished by three facts: (1) As revealed by the 1972 trial transcript, a letter from the prosecutor in the 1972 case, and interviews with the FBI agents who investigated it, "this was . . . a defensive killing because [petitioner] was being the victim of a homosexual attack" (H. Ex. 42; see H. Ex. 15, 34, 45, 48, 49, 66); (2) A psychiatrist testified at the 1972 trial that petitioner was insane at the time of the offense due to a mental disease that caused him to lose control under stress (H. Ex. 131, at 763, 766-70); (3) On these bases, the jury had rejected first-degree murder and convicted of second-degree; and the federal judge had recommended that petitioner receive psychiatric care. *Id.* at 643. Zimmermann proceeded to conceal these aspects of his 1972 aggravator by:

- Suppressing the 1972 trial transcript and the judgment recommending psychiatric care.[13]

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[13] The district court ruled that Zimmermann's withholding of the 1972 transcript violated his obligation to disclose exculpatory evidence, but that this nondisclosure was not material "standing alone." J.A. 73. On the Rule 60(b) motion now at issue, the materiality of any one act of nondisclosure by Zimmermann would not be "considered . . . item by item" (*Kyles* v. *Whitley*, 514 U.S. at 437 & n.10 (1995)), but "collectively" (*id.*) in light of all Zimmermann's acts of subterfuge, concealment, and misrepresentation.

- Misrepresenting the contents of the 1972 transcript and judgment in a letter to the psychiatrists who had been ordered by the trial judge to evaluate petitioner and report to the court. Zimmermann told the psychiatrists that there was "*no evidence from the records submitted to us in that [1972] proceeding that the defendant relied upon an insanity defense at that trial.*" H. Ex. 34; see H. Ex. 28, 36.
- Falsely informing the same psychiatric evaluators that the 1972 incident did not involve homosexual threats and "was a cold blooded premeditated murder" in a "gang" war in the prison. H. Ex. 34.
- Falsely informing defense counsel that if the defense delved into the 1972 murder at trial (which it thereupon did not), an FBI agent "would testify that Petitioner's 1972 conviction was the result of a 'drug turf war,' and not a homosexually-related killing, as Petitioner contended." J.A. 85. As the district court found in addressing petitioner's ineffective-assistance claims, "the 1972 conviction was not over drugs and gangs as represented by the prosecution to defense counsel. The murder concerned homosexual conduct that the jury could have found more mitigating." *Id.*
- Falsely assuring the jury in sentencing-phase summation that the 1972 murder was "deliberate[] with malice aforethought" and involved no "psychiatric examination or . . . extreme emotional disturbance or whatever." T.T. 1979, 1982.

b. Additionally, to jigger the balance of aggravation and mitigation:

- Zimmermann contrived to enhance the aggravating power of petitioner's prior convictions by (1) promising he would not pass indictments to the jurors, but then (2) passing to the jury the indictment underlying petitioner's 1970 juvenile conviction for assault, which revealed other charges.

The Tennessee Supreme Court ruled this gimmick "improper," "border[ing] on deception," but not prejudicial by itself. 789 S.W.2d at 552.

- Zimmermann suppressed a number of statements by Miller saying that Miller and petitioner had not planned the Daniels incident themselves but were taking orders from their employer Alan Boyd and his henchman William Beard, who (as Zimmermann knew) supplied the guns used in the incident, paid Miller to flee the jurisdiction, lied to police about Miller's departure, and (as the district court found) were the leaders of "a nascent religious group that had as its goal 'cleaning up' the African-American community by eliminating illegal . . . drug dealing" (J.A. 74). According to this evidence, Boyd and Beard cooked up the plan for Miller and petitioner to intimidate the marijuana- and cocaine-dealing victim as (in Zimmermann's words) the group's "first vigilante mission" (H. Ex. 42). See T.T. 1800; H. Ex. 15, 57, 93, 110 (ex. 82); H.T. 1039, 1047. Having suppressed the state's failure to investigate these leads (cf. *Kyles*, 514 U.S. at 442, 447), Zimmermann argued to the jury that petitioner had planned the incident himself for entirely venal reasons and that his sentencing-phase testimony about the religious organization was "bunk." T.T. 1837-48, 1982-83.
- Knowing that the defense hoped to rely on emotional distress and mental disorder as mitigating factors (H. Ex. 63, at 600), Zimmermann suppressed: (1) evidence suggesting (as he described it) that petitioner "is plain wacko" and revealing that petitioner "has a long history of institutionalization . . . and at every juncture seems to be shrunk two or three different ways" (H. Ex. 42); (2) the 1972 trial transcript and order recommending psychiatric care based on evidence that he blacks out under stress and has a "borderline" psychosis (see J.A. 95); (3) two law enforcement reports that after his arrest, petitioner "was crying . . . would not respond to our questions . . . started to hit his

head on the table and then he jumped up still handcuffed to the chair and banged his head up against the wall"; "started to bang his head on the wall again"; and later "started banging his head against the floor in the presence of Rev. Turner," requiring petitioner to be placed in a padded cell on "suicide" watch (H. Ex. 7, 8). In an eve-of-trial motion to bar the defense from mentioning petitioner's mental condition to the jury, Zimmermann misinformed the court that the results of petitioner's court-ordered psychiatric evaluation (which had itself been skewed by Zimmermann's misrepresentations to the evaluators) "reflect *no* [emphasis in original] diagnosis of any mental disease, defect, emotional disturbance or even a personality disorder," and that "the co-defendant . . . has no evidence of the same either," notwithstanding the diagnosis of petitioner as insane in the suppressed 1972 transcript, and the prosecutors' own notations on their copy of Miller's statement (in which Miller said petitioner "went from day to night," "was just . . . babbling," was acting "crazy," and was "a maniac") that Miller's description suggested "Insanity & [a] mitigating factor." H. Ex. 73, 51 (at 166-67, 171, 177); H.T. 962. Then, in summation at the capital-sentencing phase, Zimmermann baldly asserted that there was no evidence "of a psychiatric examination"—"you're looking at a depraved man, not someone suffering from severe extreme emotional disturbance, a depraved man." T.T. 1981-82.[14]

[14] At the sentencing phase, petitioner testified that he could not remember what happened on the night of the killing. T.T. 1865, 1896. Petitioner also testified:

> I can't give you – to you detail to detail on how things transpired insofar as Mr. Daniel Patrick's (sic) death . . . . When I say that, I mean – I'm saying that my mind – I'm not telling you that I was crazy – I'm not saying that I am crazy. But what I am saying is, I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. But I don't remember – you know, I don't remember too much of why that all of a sudden came to me. All I know is that I'm the man that stabbed Mr. Daniel Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman.

T.T. 1864-65. Petitioner's meandering and incoherent testimony leaves entirely unclear whether he is saying he assaulted the victims; that a memory of doing so had just that moment "all of a sudden came to me"; that he only "submits" that he committed the assaults based on what "I learned from the information you [the state] have given" (T.T. 1865, 1895-96); or that he thought (as he at other points says) he was being asked to confirm what other witnesses had said (see T.T. 1893). In the state's closing argument moments after petitioner testified, the prosecutors did *not* claim that petitioner had admitted stabbing the victims, but instead were at pains to convince the jury that petitioner wasn't crazy. TT. 1938, 1981-82. Likewise, the district court found that petitioner "lost his composure" on the stand–crediting testimony by petitioner's trial lawyer that petitioner's bizarre behavior was "'one of the saddest things I have seen in my legal career'" and that due to counsel's "deficiencies," petitioner "was not prepared to go on the stand, [and] . . . because of . . . his mental health problems . . . he just broke down." J.A. 96.

7. It is plain that if the jurors had been reliably informed of the facts that the prosecutor suppressed and misrepresented, they would probably not have returned a death verdict by the unanimous vote required under Tennessee law. See *Kyles*, 514 U.S. 419, 433. So petitioner's claims of prosecutorial misconduct are (at the very least) quite strong; and the question now presented is whether he must be categorically barred from receiving federal judicial consideration of their merits because, at an earlier stage of this same federal habeas corpus proceeding, he was barred from merits review by the district court's now-dispelled misunderstanding of an aspect of Tennessee postconviction procedure as that bears upon the exhaustion requirement of 28 U.S.C. § 2254(c).

II. PETITIONER'S REQUESTS FOR A MERITS ADJUDICATION OF HIS PREVIOUS, UNADJUDICATED PROSECUTORIAL MISCONDUCT CLAIMS ARE NOT, AS THE SIXTH CIRCUIT ERRONEOUSLY HELD, NONJUSTICIABLE "SECOND OR SUCCESSIVE" HABEAS CORPUS APPLICATIONS.

The prosecutorial misconduct claims summarized in the preceding pages were all presented to the district court below in petitioner's 1996 habeas corpus application but were not adjudicated on the merits.[15] They were deemed unexhausted, and thus procedurally barred, for failure to present them to the Tennessee Supreme Court in an application for discretionary appeal under TRAP 11. Immediately after the Tennessee Supreme Court promulgated TSCR 39, clarifying that TRAP 11 review was not, and never had been, an available state remedy for petitioner, he promptly sought an adjudication of his previously presented, unadjudicated claims, both by a Rule 60(b) motion in the district court and by a motion to the court of appeals to remand to the district court for its consideration of TSCR 39.

The Sixth Circuit closed both routes to the merits. It accepted respondent's argument that "a Rule 60(b) motion is the equivalent of a successive habeas corpus petition." J.A. 38. It also denied petitioner's motion to remand his appeal—in which no mandate had yet been entered—to permit the district court to take account of the supervening effect of Rule 39. *Id.* 38

[15] A few other, isolated claims of misconduct were adjudicated on the merits because the district court found them exhausted. These were rejected on the ground that the specific items of undisclosed or improperly handled information involved were not material, "standing alone." J.A. 73. In connection with Rule 60(b) consideration of the overwhelming bulk of petitioner's prosecutorial misconduct claims – those that the district court held unexhausted – the materiality of *all* of the items involved in the numerous unadjudicated claims as well as the few adjudicated ones would have to be assessed "collectively" under *Kyles v. Whitley*, 514 U.S. 419 (1995).

Although the Sixth Circuit did not explain the latter ruling, it presumably rested on the notion that the remand motion, too, was equivalent to a successive habeas application for purposes of 28 U.S.C. § 2244(b). The upshot was to categorically bar any federal-court consideration of petitioner's unadjudicated claims, because 28 U.S.C. § 2244(b)(1) requires, without exception or qualification, the dismissal of every "claim presented in a second or successive habeas corpus application . . . that was presented in a prior application."

The Sixth Circuit's rulings are irreconcilable with this Court's precedents and with the basic principles of federal habeas corpus law.

1. This is not a case in which petitioner has failed to do anything required of him in order to preserve his prosecutorial misconduct claims for federal review. From day one, he pursued those claims in precise conformity with state and federal law. Petitioner presented all of his federal constitutional claims—including the prosecutorial misconduct claims—to the state trial court and to the state Court of Criminal Appeals on postconviction review. He then followed the dictates of Tennessee law in seeking permission to appeal to the state supreme court on some claims but not others. TRAP 11, like this Court's Rule 10, provides that permission to appeal will be granted only in narrow, extraordinary circumstances, such as "(1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority." TRAP 11(a). These provisions tell the litigant or lawyer who respects them that an application to Tennessee's highest court is not an available remedy for each and every one of a convicted defendant's postconviction claims of federal constitutional error. Petitioner's counsel determined that the screening criteria of TRAP 11 were met only with respect to a subset of his federal constitutional claims, which he raised in his motion for permission to appeal. These did not include the bulk of his prosecutorial

misconduct claims, which had been resolved without discussion by the Tennessee Court of Criminal Appeals and involved no issues of general applicability precisely because Zimmermann's misbehavior was so extreme.

After the Tennessee Supreme Court denied petitioner leave to appeal, he properly presented all of his federal constitutional claims in his federal habeas corpus application. The district court found that he had been denied effective assistance of counsel at sentencing and accordingly vacated his death sentence. But it declined to consider most of his claims of prosecutorial misconduct as an alternative or additional ground for sentencing relief because it took the view that his failure to include them in his TRAP 11 motion for permission to appeal rendered them subject to the strictures of 28 U.S.C. § 2254(b), forbidding habeas corpus relief when an "applicant has [not] exhausted the remedies available in the courts of the State." This ruling supposed that an appeal by permission to the Tennessee Supreme Court under TRAP 11 *was* a "remed[y] available" to petitioner within the meaning of § 2254(b) and its companion provision, § 2254(c).

That supposition has been rendered entirely untenable by supervening events. While petitioner's case was pending in the court of appeals on the state's appeal and his protective cross-appeal, this Court decided *O'Sullivan* v. *Boerckel*, holding that a discretionary application to a state's highest court is ordinarily an "available" remedy which must be exhausted under § 2254(b) and (c) but that "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." 526 U.S. at 847-48. And while petitioner's case was pending in this Court on his 2001 Certiorari Petition, the Tennessee Supreme Court accepted the option offered by *O'Sullivan* to make clear that the monitory criteria of TRAP 11 reflect that court's considered policy that it does "not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." *Id.* at 847. It promulgated TSCR 39 as its

means of "clarif[ying]" (TSCR Order (June 28, 2001)) that the TRAP 11 criteria are not to be disregarded for the sake of federal habeas exhaustion, but that a convicted defendant in Tennessee "exhaust[s] all available state remedies . . . when the claim has been presented to the Court of Criminal Appeals" (TSCR 39). And, to clarify that this had always been the correct interpretation of TRAP 11, the Tennessee Supreme Court expressly made Rule 39 applicable to all cases—past, present, and future—processed under TRAP 11 since 1967 when the Court of Criminal Appeals was created.

In light of TSCR 39, petitioner promptly moved (beginning on the very day that his 2001 Certiorari Petition was denied) to obtain a merits adjudication of the prosecutorial misconduct claims that the district court had previously—and now demonstrably incorrectly—held were not properly exhausted.

Again, as at every earlier stage of the proceedings, petitioner faithfully followed the controlling dictates of state and federal law in attempting to secure a single federal habeas adjudication of these claims. The Sixth Circuit did not, and could not, find otherwise or fault petitioner for his diligence and perseverance in preserving the claims. Instead, the Sixth Circuit foreclosed their consideration on the merits by mechanically applying an iron-clad equation of *any* Rule 60(b) motion in a habeas corpus proceeding with a "second or successive habeas corpus application" that must be dismissed automatically under 28 U.S.C. § 2244(b)(1).

2. That equation is doubly wrong. It rests on two premises, both of which are foreclosed by this Court's precedents. The first premise is that the successive-petition provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEPDA"), current 28 U.S.C. § 2244(b)(1), apply to petitioner's Rule 60(b) motion. They do not, because petitioner's application for a writ of habeas corpus was filed in the district court on April 23, 1996, prior to the effective date of AEDPA. See *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997). Of course, *appellate* proceedings instituted after AEDPA's effective date

are governed by AEDPA's appeal provisions (*Slack* v. *McDaniel*, 529 U.S. 473, 478 (2000)), but that is because they constitute a distinct "case" on appeal which is "the relevant case for a statute directed to appeals" (*id.* at 482). Even in post-AEDPA appeals, "*Lindh* requires a court of appeals to apply pre-AEDPA law in reviewing [a] . . . trial court's ruling" on issues presented by a pre-AEDPA habeas petition. *Id.* at 481. And Rule 60(b) motions come squarely within this dictate because the very office of a Rule 60(b) motion is to correct an erroneous judgment previously entered in the *same* case, and Rule 60(b) on its face recognizes that the motion is *not* an "independent action" or new case. "Because the question whether [petitioner's Rule 60(b) motion is to be treated as a] . . . second or successive [habeas petition] implicates his right to relief in the trial court, pre-AEDPA law governs." *Id.* at 486. And *Slack*, as we shall see, also clearly establishes that nothing in pre-AEDPA law bars a Rule 60(b) motion in petitioner's circumstances.

3. This Court has also authoritatively rejected the second premise of the Sixth Circuit's ruling equating petitioner's Rule 60(b) motion with a successive habeas petition—the notion that a federal habeas petitioner's second attempt to secure relief on a previously presented claim is *eo ipso* a "successive application" within § 2244(b)(1) even when the claim was not adjudicated on the merits at the first attempt. On this point, *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack* v. *McDaniel*, *supra*, are controlling. In both of those cases, a federal habeas corpus court declined to reach the merits of constitutional claims on a procedural ground that subsequently ceased to have force, and this Court held that the habeas applicant's renewed effort to obtain a single merits adjudication of his otherwise properly preserved claims could not be turned away as "second or successive."

In *Stewart*, the federal district court had initially granted Martinez-Villareal habeas relief on one claim but dismissed another claim—that he was incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986)—as premature. The

court of appeals reversed the grant of relief. Subsequently, Martinez-Villareal filed a motion in the district court "to reopen his *Ford* claim," which the district court held to be an impermissible "second or successive" petition. This Court ruled that the district court had erred in so doing. Specifically, the Court rejected the position that, because Martinez-Villareal "already had one 'fully-litigated habeas petition, the plain meaning of § 2244(b) as amended requires his new petition to be treated as successive.'" 523 U.S. at 643 (quoting Pet. Br. 12)). The error in this position, the Court explained (*id.*), was its failure to recognize that "the only claim on which [Martinez-Villareal] . . . now seeks relief is the *Ford* claim that he presented to the District Court, along with a series of other claims, in [his original habeas application]":

> This may have been the second time that respondent had asked the federal courts to provide relief on his *Ford* claim, but this does not mean that there were two separate applications, the second of which was necessarily subject to § 2244(b). *There was only one application for habeas relief*, and the District Court ruled (or should have ruled) on each claim at the time it became ripe. *Respondent was entitled to an adjudication of all the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief.*

Id. (emphasis added). The Court thus distinguished the case before it from "the situation where a prisoner raises a *Ford* claim for the first time in a petition filed after the federal courts have already rejected the prisoner's initial habeas application." *Id.* at 645 n.*.

The Court in *Stewart* found particularly persuasive an analogy to the proper treatment of habeas applications that are dismissed for failure to exhaust state remedies, then re-filed following exhaustion. In that circumstance, the subsequently filed petition is not "successive." 523 U.S. at 644. The Court concluded that a claim previously dismissed on procedural grounds such as prematurity "should be treated in the same

manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies." *Id.* The critical factor for the Court was that "in both situations, the habeas petitioner *does not receive an adjudication of his claim*. To hold otherwise would mean that *a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review*." *Id.* at 645 (emphasis added).

Slack posed the precise case that *Stewart* had contemplated analogically. Slack's 1991 federal habeas petition was dismissed for non-exhaustion. After exhausting his state remedies, Slack filed a (numerically) second federal habeas petition in 1995:

> The District Court dismissed claims Slack failed to raise in his 1991 petition based on its conclusion that Slack's 1995 petition was a second or successive habeas petition. This conclusion was wrong. A habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state remedies is not a second or successive petition.

Slack, 529 U.S. at 485-86.[16] And of course the very statutory text of AEDPA points to this conclusion: Congress consistently distinguished between "claims" and "applications" and proscribed only successive *applications*, which is to say by necessary implication that a habeas petitioner's presentation of a "claim" on two occasions does not, without more, trigger § 2244. See, *e.g.*, 28 U.S.C. § 2244(b)(1) ("A *claim* presented in a second or successive habeas *application* under section 2254

[16] It is true that *Slack* was decided under pre-AEDPA law. But *Slack*'s reliance on the authority and reasoning of *Stewart*, coupled with *Slack*'s express statement that "we do not suggest the definition of second or successive would be different under AEDPA," 529 U.S. at 486, makes it quite clear that *Slack* would have reached the same conclusion under AEDPA.

that was presented in a prior *application* shall be dismissed." (emphasis added)).

4. The Sixth Circuit's equation of a Rule 60(b) motion with a successive habeas application even though the motion raises only issues that were presented but unadjudicated in the original application for the writ would produce a result every bit as "far reaching and seemingly perverse" as that condemned in *Stewart*, 523 U.S. at 644. AEDPA's § 2244(b)(1) categorically requires that any claim presented in a second or successive habeas application that was presented in a prior application "shall be dismissed." The Sixth Circuit's equally categorical holding in petitioner's case, that every Rule 60(b) motion must be treated as a successive application within § 2244(b), means that *no* motions for relief from a habeas judgment can *ever* be granted, even though the judgment was entered through mistake, fraud, or any of the other fundamental (though limited) miscarriages of justice that invoke the traditional power of courts in the Anglo-American tradition "to vacate judgments whenever such action is appropriate to accomplish justice." *Klaprott* v. *United States*, 335 U.S. 601, 615 (1949).

Nothing in the text or legislative history of AEDPA suggests that Congress intended to produce a result so impractically fettering to the federal courts and profoundly unfair to the parties before them. To the contrary, Congress adopted AEDPA against the backdrop of this Court's consistent recognition that a federal court's refusal to consider claims presented in an initial habeas petition "is a particularly serious matter," for it requires denying the "petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996). Due to the "importance of a first federal habeas petition," this Court has made clear that "it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Id.* at 330. AEDPA cannot be supposed to have upset these traditional understandings *sub silentio*. Under AEDPA, "[t]he writ of habeas corpus [still] plays a vital role in

protecting constitutional rights. In [enacting the statute] . . . Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights . . . ." *Slack*, 529 U.S. at 483.

It is therefore not surprising that every other court of appeals to consider the question has rejected the Sixth Circuit's holding in this case that a Rule 60(b) motion is categorically forbidden as a successive habeas application. Other circuits hold that Rule 60(b) motions never constitute successive applications (see *Rodriguez* v. *Mitchell*, 252 F.3d 191 (CA2 2001)), or that such motions "may," in specific circumstances, be deemed successive applications (see, *e.g.*, *Thompson* v. *Calderon*, 151 F.3d 918, 923 n.3 (CA9 1998): "It suffices to say that a bright line rule equating all Rule 60(b) motions with successive habeas petitions would be improper."). The latter courts focus on whether the Rule 60(b) motion seeks to evade the prohibition against successive applications by (i) raising new claims or evidence, or (ii) relitigating claims that have already been decided on the merits. See *Thompson* v. *Calderon*, 151 F.3d at 921; *United States* v. *Rich*, 141 F.3d 550, 553 (CA5 1998); *Felker* v. *Turpin*, 101 F.3d 657, 660 (CA11 1996); *Mathenia* v. *Delo*, 99 F.3d 1476 (CA8 1996), *cert. denied*, 521 U.S. 1123 (1997); *Hunt* v. *Nuth*, 57 F.3d 1327, 1339 (CA4 1995). It is the approach of these cases, and the appropriate construction of AEDPA, that, so long as a petitioner's claims are entirely set forth in his or her initial "application," and s/he does not seek a second merits adjudication of the claims, "[t]here [is] only one application for habeas relief" (*Stewart*, 523 U.S. at 643-44), and Rule 60(b) consideration is available because the petitioner in those circumstances asks only that the district court "grant the original application" (*Carey* v. *Saffold*, 70 U.S.L.W. 4558, 4563 (June 17, 2002) (Kennedy, J., dissenting)).

5. Under § 2244, as interpreted by this Court in *Stewart*, petitioner's attempts to secure relief on his unadjudicated claims (the "TSCR 39 Claims") are not prohibited "successive"

habeas applications. Petitioner relies not upon the technical form of his requests—*i.e.*, the labels "petition for rehearing" in the court of appeals and "Rule 60(b) motion" in the district court—but upon their substance. Petitioner seeks an adjudication only of his claims of prosecutorial misconduct set forth in his original habeas petition, which the district court never considered on the merits. The factual predicate for those claims was stated in the original petition and developed at the evidentiary hearing on that petition. Nothing petitioner seeks now to have adjudicated *either* (i) goes beyond "the claims presented in his earlier, undoubtedly reviewable, application," *Stewart*, 523 U.S. at 643, or (ii) has yet been adjudicated on the merits in federal court, compare *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998).

The only arguable distinction between this case and *Stewart* is that here the district court, after determining that petitioner's TSCR 39 claims were not exhausted, denied petitioner relief on those claims rather than dismissing them "without prejudice." This distinction wholly lacks substance. Once again, it is essential to look behind labels and to view the parallel rulings in petitioner's case and in *Stewart* in the context of commonplace, customary federal habeas corpus practice.

Ordinarily, a petition that contains at least one unexhausted claim must be dismissed without prejudice to permit exhaustion. *Rose* v. *Lundy*, 455 U.S. 509 (1982). In petitioner's case, the district court held that petitioner's TSCR 39 claims were not properly exhausted. But the court also recognized that "[p]etitioner may no longer present those claims to the state court . . . because they would be barred by the statute of limitations." Given that "[p]etitioner ha[d] no remedy currently available in state court," the district court deemed the TSCR 39 claims to be procedurally defaulted; it dismissed them outright (*id.*); and it proceeded on to consider petitioner's other challenges to his death sentence, one of which it sustained. In support of this practical approach, the district court cited and followed the Sixth Circuit's holding that "[i]f a prisoner fails to

present his claims to the state courts and he is now barred from pursuing relief there, his petition should not be dismissed for lack of exhaustion because there are simply no remedies available for him to exhaust." *Hannah* v. *Conley*, 49 F.3d 1193, 1195-96 (1995).

Nothing about this treatment of the TSCR 39 claims converts petitioner's later requests for *one* merits ruling on them into "successive applications" under the logic of *Stewart*. To the contrary, the ruling denying the TSCR 39 claims because they were unexhausted, and because no state procedures for exhausting them remained open, produced the precise result, for essentially the same reason, as the dismissal without prejudice in *Stewart*: "[I]n both situations, the habeas petitioner [did] . . . not receive an adjudication of his claim." *Stewart*, 523 U.S. at 645.

6. Petitioner's right to an adjudication of his TSCR 39 claims is all the more apparent when this case is viewed within the broader context of the historic role of federal habeas corpus and the aim of the exhaustion doctrine in relation to that role. Federal habeas corpus exists to correct federal constitutional violations that the state courts have failed or declined to correct. The exhaustion doctrine, in turn, "protect[s] the state courts' role in the enforcement of federal law and prevent[s] disruption of state judicial proceedings." *Rose*, 455 U.S. at 518-19. Thus, this Court has recently confirmed that exhaustion "serves AEDPA's goal of promoting 'comity, finality, and federalism,' by giving state courts 'the first opportunity to review [a] . . . claim,' and to 'correct' any 'constitutional violation in the first instance.'" *Carey*, 70 U.S.L.W. at 4560 (quoting *Williams* v. *Taylor*, 529 U.S. 362, 436 (2000)).

In furtherance of these objectives, the federal habeas statute leaves it to the states to define the post-conviction procedures that a prisoner must exhaust as a predicate to pursuing federal habeas relief. *E.g.*, *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991) (a habeas petitioner must satisfy "the State's procedural requirements" for presenting federal constitutional claims); cf.

Carey, 70 U.S.L.W. at 4560 ("it is the State's interests that [AEDPA's] . . . tolling provision seeks to protect, and the State, through its Supreme Court decisions or legislation, can explicate timing requirements more precisely should that prove necessary"). Consequently, as this Court held in *O'Sullivan*, a federal habeas petitioner is required to invoke "one complete round of the State's established appellate review process" (526 U.S. at 845), but, concomitantly, federal law does *not* require "the exhaustion of any specific state remedy when a state has provided that that remedy is unavailable" (*id.* at 847).

Tennessee, for its part, has long chosen not to provide a right of appeal to its state supreme court in post-conviction matters. Instead, it has opted for a system in which the state's highest court reviews applications for permission to appeal and grants them only in limited classes of cases involving important legal issues. Litigants and lawyers are advised of these limits and expected to respect them. See TRAP 11. Prior to this Court's decision in *O'Sullivan*, Tennessee had never explicitly articulated the state's view of the relationship between its discretionary application-for-permission process and the federal exhaustion requirement. In response to *O'Sullivan*, however, the state clarified that an application for permission to appeal is not an "available" remedy for purposes of preserving claims for federal habeas corpus review. Rather, a defendant "exhaust[s] all available state remedies . . . when the claim has been presented to the Court of Criminal Appeals." TSCR 39. And, rather than adopting a new rule with prospective application, the state pointedly declared that TSCR 39 reflects existing law, applicable to "all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967." *Id.*

Through rules such as TRAP 11 and TSCR 39, Tennessee seeks to channel "the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Coleman*, 501 U.S. at 749 (quoting *Reed* v. *Ross*, 468 U.S. 1, 10 (1984)). In particular, Tennessee has now made plain that its long-standing system of screening

putative appeals can best achieve its aim—to preserve the resources of its supreme court—by discouraging lawyers from filing applications for permission to appeal that do not come within the restricted categories of TRAP 11. And its promulgation of TSCR 39 on June 28, 2001, has made particularly plain that its procedures are designed to discourage the filing of applications simply for the purpose of federal exhaustion—applications that waste the time of the Tennessee Supreme Court in reviewing claims that even the lawyers who tender them do not believe meet the requirements of TRAP 11.

The clarification of Tennessee law effected by TSCR 39 established explicitly, authoritatively, and unequivocally that the ground on which the district court had previously refused to consider petitioner's TSCR 39 claims was misguided. Petitioner thereupon advised the courts below of the supervening promulgation of TSCR 39, and requested adjudication of the merits of his federal claims that TSCR 39 had clarified were exhausted. The ensuing persistence of the courts below in enforcing an exhaustion rule contrary to Tennessee's clear pronouncement of the way it wants its own postconviction system to work is an affront to that state's self-determination and a subversion of its interests. This is "a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer* v. *Black*, 503 U.S. 222, 235 (1992).

Without the support of any state interest—and, indeed, in the face of the Tennessee Supreme Court's declaration that it *contravenes* an important interest of the State of Tennessee—the theory of exhaustion on which the district court refused to consider petitioner's TSCR 39 claims can no longer be thought to justify denying him a federal habeas corpus determination of the merits of those claims. This Court has said repeatedly that "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence" and remains "a bulwark against convictions that violate 'fundamental fairness.'" *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982). See, *e.g.*, *Slack*, 529 U.S. at 483; *Smith* v. *Bennett*, 365 U.S. 708, 712 (1961). Petitioner has

properly preserved and pleaded claims of egregious violations of fundamental fairness, and he should have a federal court's adjudication of those claims.

III. PETITIONER IS ENTITLED TO AN ADJUDICATION OF THE MERITS OF HIS PROSECUTORIAL MISCONDUCT CLAIMS.

What we have said so far argues for reversal of the Sixth Circuit's rulings rejecting petitioner's Rule 60(b) motion and his appellate remand motion on the grounds that these are successive habeas applications barred by AEDPA's § 2244(b). If this Court decides no more than this, then it will presumably remit the case to the two lower courts in which the respective motions were presented, with appropriate instructions for those courts to consider the remaining procedural issues in the first instance—whether the court of appeals should remand the initial appeal to the district court, and whether the district court should signify to the court of appeals its inclination to entertain the Rule 60(b) motion. But we believe that this record affirmatively establishes petitioner's entitlement to a merits adjudication of his TSCR 39 claims, and we urge this Court to so hold, on either or both of the following grounds: First, because petitioner promptly sought relief in the court of appeals before the mandate issued on appeal following denial of his 2001 Certiorari Petition, the Sixth Circuit was obliged to modify its judgment and to remand the case in light of the Tennessee Supreme Court's controlling pronouncement of state law in TSCR 39. Second, under Fed. R. Civ. P. 60(b) petitioner is entitled to "relief from [the] judgment" of the district court dismissing his prosecutorial misconduct claims without consideration of their merits.

A. The court of appeals erred in refusing to modify its judgment and remand the case to the district court for further consideration in the light of TSCR 39

Before the Sixth Circuit issued its mandate on appeal, the Tennessee Supreme Court had promulgated TSCR 39, and petitioner moved the court of appeals to modify the judgment

to take account of TSCR 39. It is hornbook law that until the mandate is issued, the case "remains within the jurisdiction of the court of appeals" (WRIGHT, ET AL., FEDERAL JURISDICTION 2d § 3987 (1999)) and the judgment is not "final" (*id.* § 3987.1). An appellate court's ruling is ineffective if "no mandate was ever issued thereon" (*Forman* v. *United States*, 361 U.S. 416, 426 (1960)), for the mandate has "controlling significance, for appellate purposes" (*Commissioner* v. *Estate of Bedford*, 325 U.S. 283, 285-86 (1945)). See, *e.g.*, *Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90, 97 (CA3 1988) ("An appellate court's decision is not final until its mandate issues."). And the fact that the mandate has not issued takes on even greater significance in the context of federal habeas corpus, because it is upon the issuance of the mandate that the state is "entitled to the assurance of finality." *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998).[17]

Given that the mandate had not issued at the time petitioner sought relief in the court of appeals, and furthermore that no judgment had been entered against petitioner by the district court, the Sixth Circuit was obliged to give effect to TSCR 39. It is a basic principle of appellate procedure that "a court is to apply the law in effect at the time it renders its decision." *Bradley* v. *Richmond Sch. Bd.*, 416 U.S. 696, 711-12 (1974). "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 n.16 (1801) (Marshall, C.J.); see *Hamm* v. *City of Rock Hill*, 379 U.S. 306, 312-14 (1964) (citing cases). This Court, for

[17] In consideration of the state's interest in finality, *Calderon* held that a petitioner must make a "strong showing of 'actual innocence'" in order to justify a court of appeals recalling its mandate to "revisit the merits of its earlier decision denying habeas relief." 523 U.S. at 557. That standard is inapposite here for the double reason that the mandate in petitioner's case had not issued and petitioner does not seek reconsideration of a prior merits adjudication.

example, will vacate and remand a decision of a court of appeals to give effect to an intervening change in state law, recognizing that "a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." *Lords Landing Village Condo. Council of Unit Owners* v. *Cont. Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam). See also *Thomas* v. *Am. Home Prods.*, 519 U.S. 913 (1996) (per curiam).

Because of the controlling significance of the appellate mandate, it makes no difference that petitioner requested that the court of appeals amend its judgment after this Court had denied the 2001 Certiorari Petition. During the period in which a petition for certiorari is pending in this Court, the lower courts are powerless, or at the least very unlikely, to grant such a request for relief. Petitioner properly moved the Sixth Circuit to amend the judgment as soon as this Court denied certiorari. In these circumstances, the courts of appeals uniformly recognize that the denial of certiorari does not affect their power and duty to modify their judgments to account for intervening legal developments. See, *e.g.*, *Sargent* v. *Columbia Forest Prods.*, 75 F.3d 86 (CA2 1996); *First Gibraltar Bank* v. *Morales*, 42 F.3d 895 (CA5 1995); *Bryant* v. *Ford Motor Co.*, 886 F.2d 1526 (CA9 1989), *cert. denied*, 493 U.S. 1076 (1990); *Zipfel* v. *Halliburton Co.*, 861 F.2d 565 (CA9 1988); *Alphin* v. *Henson*, 552 F.2d 1033 (CA4) (per curiam), *cert. denied*, 434 U.S. 823 (1977).

Manifestly, in the unique circumstances of this case, the court of appeals erred in not amending its judgment to permit the district court to consider the TSCR 39 claims. The promulgation of TSCR 39 after the district court's rejection of those claims for non-exhaustion but before the appellate mandate had issued in petitioner's case nullified completely, decisively, and by a black-letter rule of unmistakable meaning and applicability, the entire premise for the non-exhaustion ruling. With his

first and only federal habeas proceeding not yet final, petitioner was entitled to the benefit of the Tennessee Supreme Court's correction of the fundamentally wrong premise upon which he had been denied consideration of compelling evidence that his death sentence was the product of unconscionable prosecutorial contrivance in violation of due process.

B. Petitioner was entitled to consideration of his now demonstrably exhausted prosecutorial misconduct claims under Fed. R. Civ. P. 60(b)

Even if the court of appeals was not obliged to amend its judgment, petitioner was entitled under Fed. R. Civ. P. 60(b) to relief from the district court's misguided ruling that his TSCR 39 claims were unexhausted, once the state law error underlying that ruling was demonstrably established by a definite pronouncement of the state's highest court.

1. Rule 60(b) is the modern embodiment of the federal courts' inherent authority under Article III of the Constitution to exercise "power over [their] own judgments" (*United States* v. *Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam)), including the power to correct those judgments. As such, the Rule "does not provide a new remedy at all," but rather is "simply the recitation of pre-existing judicial power." *Plaut* v. *Spendthrift Farm*, 514 U.S. 211, 234-35 (1995).

This immemorial judicial power is traditionally flexible and sufficiently resilient to take account of unforeseen contingencies. "In simple English," the Rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klaprott* v. *United States*, 335 U.S. 601, 614-15 (1949). As this Court recently confirmed, the Rule "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity.'" *Plaut*, 514 U.S. at 233-24 (quoting *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). See also

Liljeberg v. *Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988).

2. Rule 60(b) applies in habeas cases. The habeas jurisdiction is essentially an equity forum (see, *e.g.*, *Schlup* v. *Delo*, 513 U.S. 298, 319 (1995); *Gomez* v. *United States District Court*, 503 U.S. 653, 653-54 (1992)), and it is inconceivable that courts exercising such jurisdiction would *not* have the inherent power traditionally possessed by all other courts to correct their own judgments to avert injustice. Nothing in AEDPA (or any other habeas statute enacted by Congress) restricts the district courts' authority to apply Rule 60(b). Instead, when enacting AEDPA, Congress crafted specific restrictions on the presentation of "successive" habeas applications, which are not applicable to petitioner's case. See Part II, *supra*.[18] In addition, this Court has limited the retroactive application of supervening judicial decisions by the doctrine of *Teague* v. *Lane*, 489 U.S. 288 (1989), which provides that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced" (*id.* at 310). This Court has accordingly stated that it is the *Teague* doctrine that constrains the application of Rule 60(b) in habeas cases. *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997). Cf. *Browder* v. *Director*, 434 U.S. 257 (1978) (expressly holding that Fed. R. Civ. P. 52 and 59 apply on habeas and suggesting that Rule 60(b) applies as well).

Nor is habeas a forum in which judgments are uniquely immune from subsequent correction. To the contrary, it is a

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[18] Indeed, because Rule 60(b) embodies the federal courts' inherent power under the Constitution to correct erroneous and inequitable judgments, the suggestion that Congress implicitly restricted the power in habeas cases would raise a substantial constitutional question. Under the doctrine of constitutional avoidance (see, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 299-304 (2001); *Vt. Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000)), AEDPA could not properly be construed as imposing such a restriction in the absence of an explicit and clear statement to that effect. And of course AEDPA contains no such thing.

"familiar principle that *res judicata* is inapplicable in habeas proceedings," for "[a]t common law, the denial by a court or judge of an application for habeas corpus was not *res judicata*." *Sanders* v. *United States*, 373 U.S. 1, 7-8 (1963) (collecting cases). Except to the extent expressly provided by Congress and this Court's jurisprudence, "[c]onventional notions of finality of litigation" do not constrain the writ. *Id.* at 8. This Court's decisions accordingly "preclude application of strict rules of res judicata" in habeas (*Schlup*, 513 U.S. at 319) and instead embrace rules having the necessary flexibility to "accommodate[] both the systemic interests in finality, comity and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case'" (*id.* at 322).

Thus, although Rule 60(b) may not be applied so as to circumvent the restrictions on successive applications or the *Teague* doctrine, the Rule indisputably applies in habeas. That has been the uniform conclusion of every court of appeals to consider the question other than the Sixth Circuit in this case. And that conclusion makes good practical sense. District courts confront a wide variety of circumstances necessitating modifications to their judgments in habeas corpus cases, whether in favor of the state or the petitioner. The broad authority conferred by Rule 60(b) provides essential flexibility to adapt to these circumstances. To take only the most obvious examples, it cannot reasonably be disputed that a district court must retain the power to correct a "mistake" in its judgment (Fed. R. Civ. P. 60(b)(1)) or to modify or reverse a judgment that rests on outright fraud (*id.* 60(b)(3)). But the Sixth Circuit's holding in this case would deem even those most basic applications of the Rule prohibited "successive" applications.

3. A comprehensive review of the lower courts' decisions applying Rule 60(b) in habeas proceedings demonstrates both the need for the Rule in this context and the extraordinary responsibility with which the courts have exercised the power that the Rule embodies. Courts have warily scrutinized claims that intervening changes in the law justify relief from judg-

ment.[19] They have also enforced stringent requirements to assure that meritorious Rule 60(b) motions are filed promptly.[20]

In one case, a district court granted Rule 60(b) relief because its decision was erroneous and, by dismissing the petition "without prejudice," deprived the petitioner of any opportunity to appeal. *Whitmore* v. *Avery*, 179 F.R.D. 252 (D. Neb. 1998). In another, the court granted 60(b) relief to further consider the habeas petitioner's claims in light of evidence developed at a hearing for a co-defendant. *Montalvo* v. *Portuondo*, No. 97 Civ. 3336 (RWS), 2001 U.S. Dist. LEXIS 10,686 (S.D.N.Y. July 30, 2001). It is settled, however, that the grant of habeas relief to a co-defendant is not a sufficient ground to justify relief under Rule 60(b). *E.g.*, *High* v. *Zant*, 916 F.2d 1507 (CA11 1990).

Only two classes of cases have recurred:

- District courts sometimes discover that their dismissal of a habeas petition rested on a legally erroneous standard, such as an unduly stringent statute of limitations. When the error becomes apparent, the court may reinstate the petition under Rule 60(b), although it will carefully examine whether the petitioner delayed in seeking relief.[21]
- Habeas petitioners sometimes fail to receive notice that their petitions have been dismissed. District courts scrutinize such claims carefully but, if satisfied that the peti-

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[19] See, *e.g.*, *Jones* v. *Murray*, 976 F.2d 169 (CA4 1992); *United States* v. *Hernandez*, 158 F. Supp. 2d 388 (D. Del. 2001).

[20] See, *e.g.*, *Rodriguez* v. *Mitchell*, 252 F.3d 191 (CA2 2001).

[21] This scenario occurred when the Second Circuit joined the other courts of appeals in holding that habeas petitioners were entitled to a one-year grace period to comply with AEDPA's statute of limitations. *Ross* v. *Artuz*, 150 F.3d 97 (1998). District courts that, based on prior circuit precedent, had previously applied a more stringent timeliness standard to dismiss habeas petitions, vacated their dismissals for petitioners who promptly sought relief under Rule 60(b). See *Matos* v. *Portuondo*, 33 F. Supp. 2d 317 (S.D.N.Y. 1999); see also *Robles* v. *Senkowski*, No. 97 Civ. 2798 (MGC), 1999 U.S. Dist. LEXIS 11,565 (S.D.N.Y. July 30, 1999) (following *Ross* v. *Artuz*, 150 F.3d 97 (CA2 1998)).

tioner is truly without fault, will apply Rule 60(b) to vacate and re-enter a judgment in order to restart the petitioner's time to appeal.[22]

As a general provision of civil procedure, Rule 60(b) is, of course, equally available to habeas respondents and petitioners. Both state and federal government attorneys have successfully availed themselves of the rule to *reinstate* criminal judgments that federal habeas courts had improvidently overturned. In *Ritter* v. *Smith*, the Eleventh Circuit had previously held that an Alabama statute imposing a mandatory death sentence was unconstitutional, and the court had issued its mandate. See 811 F.2d 1398, 1399-1400 (1987). The district court accordingly entered an order requiring Alabama to resentence Ritter within 180 days. *Id.* at 1400. One week later, this Court granted certiorari to resolve a conflict between the Eleventh Circuit's decision invalidating the statute and a decision of the Alabama Supreme Court upholding the statute. After this Court issued its opinion holding that the statutory scheme was not facially unconstitutional (*Baldwin* v. *Alabama*, 472 U.S. 372 (1985)), the state—which had received an extension of the time to resentence Ritter—moved under Rule 60(b)(6) for relief from the district court's judgment on the basis of *Baldwin*. The district court granted the motion and the Eleventh Circuit affirmed. The court of appeals explained that "the circumstances [were] sufficiently extraordinary to warrant relief under Rule 60(b)(6)" (811 F.2d at 1401), not only because of the intervening change in the law, but also because "the previous, erroneous judgment of this court had not been executed" (*id.*), "there was only minimal delay between the finality of the judgment and the motion for Rule 60(b)(6) relief" (*id.* at 1402), there was a

[22] Compare *Elmore* v. *Henderson*, No. 85 Civ. 0579, 1989 U.S. Dist. LEXIS 8742 (S.D.N.Y. July 28, 1989) with *Greenawalt* v. *Stewart*, 105 F.3d 1268 (CA9 1997) (per curiam) (finding no extraordinary circumstances that would justify vacating district court order denying habeas petition for failure to exhaust all claims when *pro se* petitioner received timely notice of order but failed to appeal).

"close relationship" between petitioner's case and *Baldwin* (*id.*), and "considerations of comity argue for the relief urged by the state" (*id.* at 1403). In rejecting Ritter's argument that states are not entitled to Rule 60(b)(6) relief, the court observed that "[w]ere the roles in this case reversed, it is clear that [petitioner] could have received the benefit of an intervening favorable Supreme Court ruling." *Id.* at 1404.[23]

Similarly, in *United States* v. *Ginsburg*, 705 F. Supp. 1310, 1325 (N.D. Ill. 1989), the district court had previously granted relief on Ginsburg's § 2255 motion, but the government filed a motion to reconsider—which the district court construed as a motion under Rule 60(b)(6)—in light of subsequent, directly contrary Seventh Circuit precedent. The district court acknowledged that post-judgment changes in law generally do not warrant re-opening a case pursuant to Rule 60(b)(6). But emphasizing that "'this is not an inexorable rule'" (quoting 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2864, at 223 (1973)), the court vacated its earlier order and dismissed Ginsburg's petition on the merits. Manifestly, if Rule 60(b)(6) were to be held inapplicable in the habeas context, that would undermine state and federal interests as well as petitioners'.

4. Although "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief" under Rule 60(b) (*Agostini* v. *Felton*, 521 U.S. 203, 239 (1997)), petitioner's case is truly extraordinary. Not only are the equities exceptional, but the circumstances—a state supreme court's promulgation of a definitive procedural rule that unquestionably demonstrates the error of a federal habeas court's decision barring consideration of the merits of a manifestly substantial and otherwise properly preserved constitutional claim—will rarely recur.

[23] Compare *Booker* v. *Singletary*, 90 F.3d 440 (CA11 1996) (affirming denial of state's Rule 60(b)(6) motion, based on intervening change in law, when the state had not demonstrated "extraordinary circumstances").

The district court's dismissal of petitioner's TSCR 39 claims was "ruled by state law" (*Lords Landing*, 520 U.S. at 896) in the strong sense of depending entirely upon the federal judge's interpretation of the applicable state rule. The district judge interpreted the state law rule to be that an application for permission to appeal was an available remedy under Tennessee law for purposes of the exhaustion doctrine because the state courts had not expressly delineated the limitations of that remedy or their implications for exhaustion. Unfortunately, the district judge got Tennessee law exactly wrong. Recognizing the possibility of such mistakes and seeking to avert their burdensome and harmful consequences under *O'Sullivan*, the Tennessee Supreme Court has now acted to make them impossible. TSCR 39 is a categorical and unambiguous pronouncement by the state's highest legal authority in its rulemaking capacity that an application for permission to appeal is not, and never has been, an available remedy under Tennessee postconviction procedure.

Accordingly, this is not a case in which a federal habeas applicant seeks to reopen a decision on the merits of any of his claims or even to reopen a procedural preclusion ruling on the basis of some supervening state court decision that requires close reading and analysis to collate with previous state court caselaw. To the contrary, TSCR 39 provides the rare kind of "clear guidance from state law" that completely obviates the need for complex or protracted "federal litigation." *Carey*, 70 U.S.L.W. at 4564 (Kennedy, J., dissenting). Cf. *Kirby Forest Indus.* v. *United States*, 467 U.S. 1, 18-19 (1984) (holding 60(b) relief appropriate in light of the straightforward nature of a change in circumstances).

This case presents additional extraordinary circumstances that are generally absent when a losing party invokes an intervening legal development as a basis for relief under Rule 60(b). In combination, these circumstances justify relief under even the most stringent standard of what "is appropriate to accomplish justice." *Klaprott*, 335 U.S. at 615. Petitioner is sentenced

to death, and the judgment that he seeks to reopen is one which—erroneously, as is now clear—foreclosed his single opportunity to demonstrate in federal court that that sentence is the product of a gross violation of due process. The state, by contrast, would suffer little harm from the reopening of the judgment. The only cost to the state—litigating petitioner's claims of prosecutorial misconduct once on the merits in federal court, and on a record already made[24]—is the minimum cost that attends every habeas petition, and is one that the federal habeas statutes deem acceptable in order to enforce federal constitutional rights when, as in this case, the petitioner has complied with his responsibility to properly present his claims to the state and federal courts.

Equally important and unusual, institutional interests weigh heavily in favor of granting petitioner Rule 60(b) relief. Whatever interest the prosecution may have in enforcing petitioner's death sentence without federal adjudication of its constitutionality, that interest is counterbalanced by the *state* interest that TSCR 39 and its explicit application to pre-promulgation cases like petitioner's were designed to promote. As we have noted above, the enforcement of the district court's errant nonexhaustion ruling in this case disserves the very comity interests that the ruling was supposed to serve when made. The district court sought only to protect the Tennessee Supreme Court's opportunity to adjudicate petitioner's federal constitutional claims in the first instance. But TSCR 39 has now made clear that the Tennessee Supreme Court regards that opportunity as a *disadvantage*—as a profligate expenditure of the time and labor it requires state supreme court justices to spend culling claims that do not meet the state's criteria for securing permission to appeal.

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[24] Because the record is complete, there is no risk that delayed factfinding will adversely affect the quality of the evidence bearing on petitioner's TSCR 39 claims, to the detriment of either party or the inconvenience of the courts.

Even absent such exceptional circumstances, when a federal ruling turns upon state law, the courts of appeals have generally recognized that a federal court's misapprehension of the applicable state law rule may be remedied under Rule 60(b) if it becomes apparent only after the ruling—especially when, as here, the state event which makes the error manifest occurs before the federal judgment has become final. *Sargent* v. *Columbia Forest Products, Inc.*, 75 F.3d 86 (CA2 1996) (Winter, J.); *Overbee* v. *Van Waters & Rogers*, 765 F.2d 578 (CA6 1985); *Lairsey* v. *Advance Abrasives Co.*, 542 F.2d 928 (CA5 1976) (Godbold, J.); *Pierce* v. *Cook & Co.*, 518 F.2d 720 (CA10 1975) (en banc); *see also Cincinnati Ins. Co.* v. *Fritzbeyers*, 151 F.3d 574 (CA6 1998); *McGrath* v. *Potash*, 199 F.2d 166 (CADC 1952) (Prettyman, J.); *Manhattan Cable Television, Inc.* v. *Cabledoctor, Inc.*, 824 F. Supp. 34 (S.D.N.Y. 1993). On the other hand, if substantial time has passed after the federal judgment became final, the equities may tip in favor of denying Rule 60(b) relief. See, *e.g.*, *DeWeerth* v. *Baldinger*, 38 F.3d 266 (CA2 1994).

The timeliness of petitioner's Rule 60(b) motion thus takes on considerable significance in demonstrating his entitlement to relief. There is a stark contrast between this case and those in which a Rule 60(b) movant seeks relief "years beyond" a final judgment (*Agostini*, 521 U.S. at 256 (Ginsburg, J., dissenting)). Less than forty-eight hours after this Court denied petitioner's 2001 Certiorari Petition, he obtained a status conference and advised the district court of his intention to file a Rule 60(b) motion. And the motion itself was filed only three weeks later—*before* the court of appeals issued its mandate; *before* the district court entered any final judgment; and *before* this Court's denial of rehearing of its order denying certiorari, an event that has special significance in Tennessee death penalty jurisprudence because, under Tennessee law, it marks the first time at which the state may set an execution date. See Tenn. S. Ct. R. 12.4; *Coe* v. *State*, 17 S.W.3d 191, 192 (Tenn. 1999).

CONCLUSION

From the time petitioner's postconviction counsel discovered the unethical and unconstitutional machinations that prosecuting attorney John Zimmermann used to procure petitioner's death sentence, they have brought these violations of due process to the attention of the state and federal courts in compliance with the rules of postconviction procedure of each court system, and with unflagging diligence. The failure of the federal district court to consider the merits of petitioner's claims of prosecutorial misconduct was a result of that court's misunderstanding of Tennessee postconviction procedure. The Tennessee Supreme Court has since acted to eliminate any possible basis for such a misunderstanding; and under this Court's precedents—principally, *Stewart* v. *Martinez-Villareal*—there remains time to rectify the consequences of the misunderstanding before they become fatal. This Court should instruct the courts below to do so.

Respectfully submitted,

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July 10, 2002

APPENDIX A

RELEVANT STATUTORY PROVISION AND RULES

28 U.S.C. § 2244. Finality of determination

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals

to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

Fed. R. Civ. P. 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Tenn. App. Proc. Rule Rule 11. Appeal by Permission from Appellate Court to Supreme Court.

(a) Application for Permission to Appeal; Grounds. -- An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

Advisory Commission Comments.

* * *

Pursuant to Rule 39, Rules of the Tennessee Supreme Court, an appellant in a criminal case will be deemed to have exhausted all available state remedies respecting a claim of error following an adverse decision by the Court of Criminal Appeals without the necessity of filing a petition to rehear or an application for permission to appeal under Tenn.R.App.P. 11(a). The Tennessee Supreme Court adopted Rule 39 in response to *O'Sullivan v. Boerckel* , 526 U.S. 838 (1999), in which the U.S. Supreme Court held that in order to satisfy the exhaustion requirement of collateral federal review under 28 U.S.C. § 2254, a state prisoner must present his or her claims to the state supreme court for discretionary review absent a state court rule or decision to the contrary. This Advisory Commission Comment is to alert attorneys to Rule 39, Rules of the Tennessee Supreme Court, which works no change to Tenn. R. App. P. 11 itself.

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

IN RE: ORDER ESTABLISHING RULE 39, RULES OF THE SUPREME COURT OF TENNESSEE: EXHAUSTION OF REMEDIES

In 1967, the General Assembly created the Tennessee Court of Criminal Appeals in order to reduce the appellate backlog in criminal cases. In most criminal and post-conviction cases, review of a final order of the Court of Criminal Appeals is not a matter of right, but of sound judicial discretion. Permission to appeal will be granted by this Court only where special and important reasons justify the exercise of that discretionary review power, Tenn. R App. Proc. 11. We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for permission to appeal upon the Court of Criminal Appeals' denial of relief in order to exhaust all available state remedies for purposes of federal habeas corpus litigation. In order to clarify that denial of relief by the Court of Criminal Appeals shall constitute exhaustion of state remedies for federal habeas corpus purposes, we hereby adopt the following Rule 39, Rules of the Supreme Court, as stated below.

> In all appeals from criminal convictions on post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by

the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

FOR THE COURT:

Riley Anderson, Chief Justice

APPENDIX B

T & Rpp'd 5/15/87

J. Zimmerman
EXHIBIT NO. 49
10-30-97

MEMO TO: Eddie Barnard, Team Leader

FROM: John Zimmermann JZ

DATE: March 24, 1987

[redacted]

RE: State v. James Lee Jones, Jr. and Harold Devalle Miller, 86-S-893, evaluation for filing of notice of intent to seek death penalty

7a

The defendant Jones was indicted on July 11, 1986 for Murder in the First Degree, Assault with Intent to Commit Murder in the First Degree with Bodily Injury, and Armed Robbery. Formerly represented by Neal McAlpin, Lionel Barrett has now been retained to represent the defendant. The case is pending discussion with a trial date of early July. The defendant Miller was indicted on 3/27/87 after his capture in Alquippa, Pennsylvania.

I. FACTS

On February 17, 1986 around 10 P.M. Jones and Miller went to see the deceased, Patrick Daniels, and his life-in girlfriend Norma Norman who lived with Ms. Norman's two children at 856 B Kirkwood. Jones went ostensibly for the purpose of introducing Miller to the deceased for the purpose of purchasing a small amount of marijuana. Ms. Norman would testify that Jones had been to their house on two previous occasions - the first time having been brought there by a friend of the deceased and introduced to the deceased for the purpose of further purchasing drugs, and the second time the defendant came alone and requested that the deceased set up a purchase of cocaine for him (although Ms. Norman denies that the deceased dealt in cocaine, claiming that the deceased told the defendant that he knew somebody that could get it for him). The facts show that the deceased apparently wholesaled nickel bags of marijuana from his apartment, although the deceased did have a full time job with a local trucking company working on the loading dock. The deceased apparently was in good standing with that trucking company.

On the night in question the deceased began to produce a small amount of marijuana to sell to Miller when Jones pulled a sawed-off shotgun out from under his coat and ordered the deceased and Ms. Norman to lie on the floor then Jones then began to bind the deceased and Ms. Norman with air conditioner duct tape, blindfolding both them and binding their hands behind their backs and their feet. At this point and time Ms. Norman testifies that Jones began stabbing the deceased multiple times to the point that

IS TI CORRE IF SO,

she heard the deceased appear as if he was dying by the sounds he was making. She testified that Miller appeared to be frozen during all this taping process and that it was Jones who was the aggressor and initiated all the action. Jones then proceeded to stab Mrs. Norman repeatedly until the knife embedded into her back, at this point, while still conscious, she heard the subjects retrieve the keys off the kitchen counter and leave through the back door. She will testify that no one entered to left the premises while the assaults were performed and that the only time the door opened and closed was after she had been assaulted and the subjects left. Investigation revealed the name of the defendant Jones, Ms. Norman positively identified the defendant in a photo lineup and the defendant was arrested at his place of business at the National Publishing Board. It was also discovered that a second employee, Henry Devalle Miller, had left mysteriously that morning from the National Publishing Board and had never returned to work. Although Mr. Miller did not have a mug shot on file, a photograph was obtained from his relatives, placed in a photo lineup, and Ms. Norman identified him in that photo lineup. Miller was captured on 3/25/87.. A search of Jones's apartment revealed the sawed-off shotgun under the defendant's mattress which was identified by the victim in this cause and also the full length black wool coat worn by Jones was also found.

HAVE YOU SEEN PHOTO LINE-UP. ANY ROOM FOR ISSUE YES/NO

ANY SEARCH ISSUE? NO/COULD WE DO A Bad ?

8a

Mr. Miller gave a full confession stating that he was solicited to go the victim's apartment for the purpose of "gangstering" the victim for the purpose of robbing him. Mr. Miller wanted to make sure that there were no bullets in the guns and therefore both weapons were unloaded. He testified that the previous night they went over to do this but that he got scared and ran away. On this particular night they went in with the intention to simply rob the victim's dope and leave. However, he says that during the scene that Jones taped up both victims stabbed the deceased and then began to stab the female when at that point Miller pulled the defendant off the victim. His action apparently saved the life of Ms. Norman. He stated that after they left Jones told him that the murder went so smoothly that they were going to have to do it again soon. The following day or so the two rode into work together and they commented on the fact that the victim survived and Jones remarked that the lady was a very strong woman. Jones stated that he and Miller would have to go to the hospital and get rid of her because she could identify them. He stated that since the victim was possibly under guard at the hospital that they would probably have to shoot out the floor to get to her. At this point Mr. Miller determined to leave work that day, which he did, and remained at large until arrested in March of 1987. He gave a statement without any promises or assurances of any plea bargain, etc.

WHAT WILL VICTIM SAY ABOUT THIS. can't say (was unc Tabbetts Jones Ex mentio

→ I WANT TO READ TRANSCRIPT. Rita has it now

II. WEAKNESSES IN CASE

000677

(a). Ms. Norman did not actually see Jones stab the deceased or herself. – SEE 1ST QUESTION. She is certain that Jones did stabbing then sounds, that Miller was too scared too move

(b). We must decide what to do with Mr. Miller. I recommend that we sever his case from Jones and let him testify to the truth of matter set forth in his confession without any specific plea bargain agreement but simply an assurance that we will treat him fairly after Jones' trial and any post-trial Motions. I recommend that we do not pursue the death penalty against Miller because of the absence of any prior record and the availability of significant amount of testimony as to his good character.

AGREE

(c). T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by Jones. Photographs of the decedent's house show blood spattering all over the kitchen. Either the defendant removes his coat before he began to stab these people, the defendant had his coat cleaned, the defendant replaced the coat found by the police with another coat (which is not likely since he would have obviously gotten rid of the shotgun) or if the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred. Also, the police seized a pair of work pants during the search of the defendant's apartment which had red spots all over it which was found not to contain any human blood stain. The red particles on the defendant's pants came from red dye used at the Publishing Board where the defendant worked. In his confession Miller stated that the stabbing of the deceased did not produce the blood that was spattered but that the blood that was splattered occurred as the deceased gasped for air after the defendant had gone to the second victim and begun to stab her.

HAVE YOU ASKED DR. HARI TO EXPLAIN THE PATTE — THERE MA BE EASY EXPLAIN FOR —

9a

III. THE DEFENDANT'S THEORY OF HIS DEFENSE

The defendant has claimed to his parole officer and to his lawyers that he was present at the time of the tapeing (obviously since the testimony against him is so strong up to this point) but claims that he and miller left the apartment and an unknown individual by the name of "Sam Blackstock" re-entered the house and stabbed the victims. The defendant claims through his lawyer that he did all of this scare the deceased into stop selling drugs on the streets since it was against his religion.

In his confession Miller denies that there was any Sam Blackstock involved. Miller's confession tracked exactly all the facts known to the State through its other witnesses.

IV. THE DEFENDANT JONES MENTAL CONDITION

The defendant Jones is just plain weird. He has a long history of institutionalization in the prisons and at every juncture seems to be shrunk two or three different ways but in all cases he's been found competent to stand trial and sane at the time he committed these offenses. In the instant case the defendant had been calling himself by the name of "Scarface" on

the streets and apparently was trying to muscle in the drug business here in Nashville. At the time of the assault the defendant kept calling himself "Scarface" and the first person to introduce the defendant to the decedent during the defendant's first visit will testify that he loaned the defendant his video tape of Scarface prior to the murder. Scarface was a movie of much violence about drug wars, take overs, etc. and the climatic violent scene occurred where Scarface mutilated the body of one of his competitors and then took a chainsaw and cut it all to pieces.

HAVE YOU SEEN MOUTH OF ARE YOU NOW?

I have received a copy of a transcript of the defendant's first trial where he plead not guilty by reason of insanity. The sole theory of that insanity defense was irresistible impulse and they found no mental disease or defect which he possessed. The government shrink rebutted adequately the claimed insanity defense of Jones and the jury also rejected the same.

There is no concern about Miller's mental condition.

10a

V. DEFENDANT JONES HISTORY

The defendant has a long record of institutionalization in the penitentiary beginning in 1969 with the commission of an armed robbery on a military installation. He was convicted pursuant to his plea on November 19, 1970 and sentenced to a term of 4 to 6 years. While incarcerated at the Federal Penitentiary in Petersburg, Virginia, the defendant murdered another inmate and after a trial was convicted in 1972 of Murder in the Second Degree and with the use of a deadly weapon inside of a Penitentiary receiving a Life sentence from the Judge plus a 10 year sentence to run concurrent. (The defendant claimed to Detective Garafola that this was simply a defensive killing because he was being the victim of a homosexual attack. The U.S. Attorney who prosecuted the case said that this was nothing more than a gang war and an out and out premeditated murder which is why, according to the U.S. Attorney, the trial judge sentenced the defendant to the maximum sentence for Second Degree Murder. We have received the transcript of that trial and defendant's confession and the transcript of the testimony bear this out and rebut the defendant's claim. The F.B.I. Agent who took the statement has agreed to come testify as to the facts and details of this incident.) The defendant was paroled by the good Federal people on December 23, 1983 where he lived in Chicago until his parole was transferred on February 21, 1985 to Nashville, Tennessee. Lou Trammel, the defendant's Federal Parole Officer here in Nashville visited the defendant after he was charged and the defendant told him that prior to the murders that he and Mr. Miller and a Sam Blackstock established a new church known as the Southeastern Church of the Gospel of Ministry and the church's main objective was to rid the community of prostitution and drugs. That on the evenings of the murders the defendant told the victims that they were the first vigilante mission of this sort and that he and

WE HAVE CHECKED A SOURCES FOR SAM BLACKSTOCK NO - REAL M. SO he looked + I will hit him a knock

Miller bound the decedent's hands and feet with duct tape but denied that he did any taping of Ms. Norman but ordered her to bedroom. The defendant went on to tell the parole officer that he and Miller left the house to wait in his car but that Sam Blackstock remained inside the house and must have then murdered the victim. He denied to his parole officer that he witnessed the murder. (We would probably have great difficulty in admitting this statement since Mr. Trammel can only say that he advised the defendant orally from memory as to his constitutional rights and also this statement is more self-serving that it is helpful to the State).

↳ You may have to attempt to use.

VI. DEATH PENALTY AGGRAVATING CIRCUMSTANCES WHICH COULD APPLY

x3

(2). The defendant Jones was previously convicted of one or more felonies involving the use or threat of violence to a person (in this case the defendant has been convicted of aiding and abetting armed robbery and of Second Degree Murder).

(5). The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind (case law in Tennessee supports a conclusion that the repeated and multiple stabbings in a case like this particularly where the victim knew that the defendant was attempting to kill him and would not stop until he had accomplished it evidences depravity and is torturous, etc.)

(7). The murder was committed while the defendants were engaged in committing, was an accomplice in the commission of, etc. any first degree murder or robbery (in this case there were items taken from the home which supports the charge of robbery and also the murder of the decedent was committed at the same time as the attempted murder of Ms. Norman).

VII. THE POSSIBLE DEATH PENALTY MITIGATING CIRCUMSTANCES

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(5). The defendants were accomplices in a murder committed by another person and the defendants' participation were relatively minor. The defendant Jones may very well testify at least at the penalty phase, if not at trial, consistent with his previous statement to his parole offficer. The absolutely contradictory to what Miller stated in his confession, and what Ms. Norman would testify to as to her observation during the crime.

(8). Diminished mental capacity. At this point in time the only shrinking of the defendant Jones has occurred at Middle Tennessee and they did a very exhaustive and thorough job as we advised them this was a potential death penalty case. There was no hitch at all whatsoever in their evaluation and they all unanimously concluded that the defendant was competent and sane. Also rebutting this claim is an article that the defendant had published while working at the National Publishing Board which represents very sane thought warning young people not to get involved in drugs or criminal behavior as you can end up behind bars and that is a no no, etc. It's a good article authored by the defendant.

VIII. OTHER PROBLEMS

(a). Judge Kurtz may not let us use the two prior convictions to impeach the defendant's testimony which although Tennessee decisional law clearly would authorize the use of them. If that's the case the defendant could testify at a trial on the merits.

(b). The Scarface element will undoubtedly have to be dealt with in some way so that the jury doesn't think the guy is plain wacko. In his confession Miller articulates in a very convincing manner the fact that the defendant was not "crazy" but just plain mean.

(d). The issues in this case pattern somewhat the issues in the death penalty case of State v. Charles Wright in that the case the issue of guilt was highly contested and mitigating circumstances were offered with regard to the commission of the crime. After the jury agreed on guilt or innocence the question of the death penalty was made very quickly. The case is not open and shut on the issue of guilt but it is very very strong given the testimony of Ms. Norman and co-defendant Miller. I believe once the jury overcomes the hurdle of First Degree Murder the penalty phase will be a rather short portion of the trial.

IX. RECOMMENDATIONS

1). That the State file notice to seek the death penalty against the defendant Jones.

2). That the State sever Mr. Miller and try his case after defendant Jones in the event that Mr. Miller agrees to testify truthfully against Jones. Further, that no plea bargain be made with Mr. Miller until after the trial and post-trial motions in Jones.

No. 01-[illegible]

FILED

SEP 13 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ABU-ALI ABDUR RAHMAN,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF OF RESPONDENT

[illegible]

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BEST AVAILABLE COPY

02 PP

CAPITAL CASE

QUESTIONS PRESENTED

I.

Whether the Sixth Circuit erred in holding that petitioner's Rule 60(b) motion was a prohibited "second or successive" habeas petition.

II.

Whether the Sixth Circuit abused its discretion in refusing to withhold its mandate (or remand to the district court) after the denial of certiorari by this Court to enable petitioner to challenge the district court's procedural default rulings that he did not appeal in the first instance.

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STATEMENT OF THE CASE

In 1987, petitioner, then known as James Lee Jones, was convicted of first degree murder, assault with intent to commit first degree murder, and armed robbery. The jury sentenced petitioner to death for the murder, finding three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the defendant was engaged in committing, or was attempting to commit, any first degree murder or robbery.[1] The Tennessee Supreme Court affirmed, *State v. Jones*, 789 S.W.2d 545 (1990), and this Court denied certiorari. *Jones v. Tennessee*, 498 U.S. 908 (1990).

In 1991, petitioner filed a petition for state post-conviction relief. The trial court denied the petition after an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed in all respects. *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn.Crim. App. Feb. 23, 1995). Petitioner then filed an application for further appellate review with the Tennessee Supreme Court under Tenn.R.App.P. 11. However, that application did not present all the claims that petitioner had previously presented to the intermediate appellate court. (J.A. 54-9) The Tennessee Supreme Court denied review, *Jones*

[1] The trial court sentenced petitioner to two consecutive life terms for the two remaining convictions.

v. State, 1995 WL 75427, and this Court denied certiorari. *Jones v. Tennessee*, 516 U.S. 1122 (1996).

Petitioner filed in the district court a petition for federal habeas corpus relief on April 23, 1996 (R. 1), and an amended petition on December 2, 1996 (R. 42), challenging his convictions and sentences. The district court issued an order granting the writ and vacating petitioner's death sentence on petitioner's claim of ineffective assistance of counsel at the sentencing phase. (J.A. 45, 46) The district court denied relief on all other claims. Several of these claims, including the claims at issue in this case, were determined to be procedurally defaulted due to petitioner's failure to exhaust by presenting them to the State's highest court, as well as his inability to establish cause and prejudice for the default or a fundamental miscarriage of justice. (J.A. 53-60, 62, 68) Both petitioner and the State appealed from the final judgment. However, petitioner did not appeal any of the district court's procedural default rulings. (J.A. 37, 130, 155)

The court of appeals reversed the judgment granting the writ as to petitioner's death sentence, but affirmed the judgment in all other respects. (J.A. 134) Rehearing was denied, (J.A. 20), but the court of appeals stayed the mandate pending a petition for writ of certiorari. (J.A. 21)

On October 9, 2001, this Court denied the petition for writ of certiorari. *Abdur'Rahman v. Bell*, 122 S.Ct. 386 (2001). The next day, petitioner filed in the Sixth Circuit a "Motion to Withhold the Mandate and Grant Rehearing En Banc or Remand for Further Proceedings," (J.A. 22, 152), in which he sought, *inter alia*, reconsideration of several prosecutorial misconduct claims previously denied as procedurally defaulted. (J.A. 154-56) The motion relied

on Tenn.Sup.Ct.R. 39, promulgated by the Tennessee Supreme Court on June 28, 2001, which provided that, from and after July 1, 1967, a litigant "shall not be required" to present a claim of error to the Tennessee Supreme Court in order to exhaust state remedies for federal habeas corpus purposes. (J.A. 278-79)

On November 2, 2001, petitioner filed a motion in the district court under Fed.R.Civ.P. 60(b)(6), seeking relief from the district court's 1998 judgment denying habeas relief. (J.A. 158) The Rule 60(b) motion likewise relied on Rule 39 and sought reconsideration of fourteen individual claims of prosecutorial misconduct (J.A. 165-66), ten of which had been denied as procedurally defaulted. (J.A. 57-8, 68)[2]

On November 27, 2001, the district court, concluding that petitioner's Rule 60(b) motion constituted a second or successive petition subject to 28 U.S.C. § 2244(b), transferred the matter to the Sixth Circuit pursuant to 28 U.S.C. § 1631. (J.A. 40) The district court also declined to issue a certificate of appealability on jurisdictional grounds. (J.A. 43) On November 30, 2001, petitioner filed a notice of appeal from the district court's action on the Rule 60(b) motion. (R. 268; J.A. 11)

On December 6, 2001, petitioner filed in the Sixth Circuit a motion requesting (1) a certificate of appealability from the district court's action on his Rule 60(b) motion; (2) *en banc* consideration of his appeal therefrom; and (3) consolidation with the previously filed motion to

[2] The district court had considered the substantive merits of the remaining four claims and denied relief on that basis. (J.A. 50, 69)

withhold the mandate and to rehear or remand. (J.A. 28) In the meantime, on January 15, 2002, the Tennessee Supreme Court set April 10, 2002, as the date for execution of petitioner's sentence. On January 18, 2002, a panel of the Sixth Circuit denied the application for a certificate of appealability and determined that the district court had properly construed petitioner's Rule 60(b) motion as a second habeas corpus petition, subject to 28 U.S.C. § 2244(b). (J.A. 35-6) On February 11, 2002, the same panel denied all of petitioner's pending motions, including his Rule 60(b) motion, which it construed as an application for leave to file a second habeas corpus petition, as well as his motion to withhold the mandate and for rehearing or remand of his original appeal. (J.A. 38)

SUMMARY OF THE ARGUMENT

In 1998, as part of its adjudication of petitioner's federal habeas petition, the district court denied relief on several of petitioner's claims, ruling that they were procedurally defaulted and that petitioner had failed to establish cause and prejudice or a fundamental miscarriage of justice. More than three years later, relying on the June 28, 2001, promulgation of a new rule – Tenn.Sup.Ct.R. 39 – petitioner sought to resurrect these claims by filing two post-judgment motions: a motion in the district court under Fed.R.Civ.P. 60(b)(6); and a motion to withhold the mandate in the court of appeals. Both courts properly rejected petitioner's effort to utilize these procedures to relitigate these habeas claims.

Petitioner's Rule 60(b) motion was properly construed as a "second or successive habeas corpus application"

under 28 U.S.C. § 2244(b) and, because it presented claims that were presented in petitioner's first petition, § 2244(b)(1) required its dismissal. The prior determination by the district court that petitioner's claims were procedurally defaulted constituted a final, conclusive adjudication of petitioner's claims. Unlike a dismissal without prejudice for failure to exhaust, a denial on grounds of procedural default contemplates that the petitioner *cannot* return to federal court in the future – the claim is barred from federal habeas review. Prior decisions of this Court, established habeas corpus practice, and the language and purpose of the statute dictate the conclusion that such an adjudication is on the merits and counts as a first petition, thus rendering any subsequent habeas petition "second or successive" within Congress' intended meaning of that phrase in § 2244(b).

Although petitioner styled his pleading as a motion under Fed.R.Civ.P. 60(b)(6), and not as another habeas petition, it nonetheless served as the functional equivalent of a new petition. While Rule 60(b)(6) purports to provide grounds for post-judgment relief on the basis of new law, its provisions do not apply to petitioners in habeas corpus cases because the practice for post-judgment habeas litigation in reliance upon new law is fully set forth by statute – 28 U.S.C. § 2244(b).

Petitioner's Rule 60(b)(6) motion reasserted his procedurally defaulted habeas claims in reliance upon the recent promulgation of Tenn.Sup.Ct.R. 39. That Rule 39 constitutes a new law cannot be seriously disputed; the Rule did not even exist when petitioner's claims were previously adjudicated. Because the motion relied upon a law that had not previously been considered by, or presented for consideration to, the district court, it was properly

regarded as a new habeas petition. Otherwise, petitioner would have been able to circumvent § 2244(b)'s restrictions simply by styling his pleading as a Rule 60(b) motion.

In addition to his Rule 60(b) motion filed in the district court, petitioner also filed in the court of appeals a motion requesting that, in light of Rule 39, the mandate be withheld, that rehearing en banc be granted to review the procedurally defaulted claims or, in the alternative, that the case be remanded to the district court for reconsideration of its procedural default rulings on the prosecutorial misconduct claims. In this Court, he asserts that the court of appeals abused its discretion in denying his motion.

But petitioner cannot demonstrate an abuse of discretion for several reasons. First, because his motion was filed in the court of appeals after this Court had denied certiorari, and because Fed.R.App.P. 41(d)(2)(D) requires a court of appeals to "issue the mandate immediately when a copy of a Supreme Court order denying the petition for a writ of certiorari is filed," the court of appeals had no discretion to stay its mandate. Under these circumstances, asking the court to stay its mandate was tantamount to requesting a recall of the mandate. But a motion to recall the mandate can be regarded as a second or successive application under 28 U.S.C. § 2244(b). And in this case, where petitioner's motion sought review of the district court's "merits" determination of procedural default on his prosecutorial misconduct claims, the motion clearly constituted such a second or successive application, which was required to be dismissed under § 2244(b)(1). It necessarily follows that the court of appeals' denial of the motion was not an abuse of discretion.

Second, even if petitioner's motion was not subject to § 2244(b), petitioner cannot demonstrate an abuse of discretion by the court of appeals in refusing to recall its mandate. Because the recall of a mandate can be exercised only in "extraordinary circumstances," is a power held in reserve only "against grave, unforeseen circumstances," and any use of the power disparages and frustrates the finality essential to our system of criminal justice and the federal balance, it can never be an abuse of discretion for a court of appeals to *refuse* to recall its mandate. Furthermore, in order to warrant a recall of a mandate, a petitioner must demonstrate that such an extraordinary act is necessary to avoid "a miscarriage of justice" defined by this Court's habeas jurisprudence, *i.e.*, "actual as compared to legal innocence." Resting solely upon a legal argument that Rule 39 applied to his claims, petitioner's motion was devoid of any assertion of "actual innocence."

Finally, even if petitioner's appellate motion is viewed simply as an ordinary motion – and not a motion to recall the mandate and a second or successive application under § 2244(b) – the court of appeals did not abuse its discretion by denying it. Petitioner had deliberately chosen not to challenge the district court's procedural default rulings in his appeal, and, as the court of appeals correctly observed, its decision "did not rest upon any procedural default." Because petitioner had chosen to abandon any challenge to the procedural default determination and then asserted the issue for the first time in his post-judgment motion, the court of appeals cannot be faulted for refusing to grant extraordinary relief on a question so belatedly raised.

Furthermore, application of Rule 39 would not have revived his prosecutorial misconduct claims anyway. "Available" state remedies must be exhausted under 28

U.S.C. § 2254 as a prerequisite for federal habeas corpus review. Petitioner's contention that Rule 39 makes a discretionary application to the Tennessee Supreme Court unavailable in criminal cases is belied by the plain text of the rule itself. Rule 39 simply provides that a litigant "shall not be required" to seek discretionary review in the supreme court; it does not make such review unavailable. But even if somehow the rule could be read to render such review unavailable, the rule could not alter the objective historical fact in this case that discretionary review was available in 1995, when petitioner chose not to present his prosecutorial misconduct claims to the Tennessee Supreme Court. Because Rule 39 cannot resurrect petitioner's procedurally defaulted claims anyway, the court of appeals did not abuse its discretion by refusing to consider them or remand the matter to the district court.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER'S RULE 60(B) MOTION CONSTITUTED A "SECOND OR SUCCESSIVE" PETITION BARRED UNDER 28 U.S.C. § 2244(b).[3]

Petitioner's Rule 60(b) motion reasserted several claims for habeas corpus relief that were presented, along with many others, in his original petition for habeas corpus relief. Relief on these several claims had been previously denied. (J.A. 60, 68)[4] 28 U.S.C. § 2244 provides, in relevant part:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

---

[3] Petitioner's lead argument (Pet. Br. 10), as well as the entire argument of the *amici* brief in support of petitioner, relates to the substantive merits of petitioner's underlying constitutional claims. But neither of the two questions before the Court, nor any "subsidiary question fairly comprised therein," U.S.Sup.Ct.R. 23(1)(c), implicates the substance of petitioner's underlying claims. Such arguments, therefore, are irrelevant and inappropriate and should be disregarded. Moreover, at least to the extent petitioner presented these claims to the state trial and intermediate appellate courts, they have been found to be without merit. *See* R. 9, Add. 15, p. 4; R. 9, Add. 11, T.R. p. 108.

[4] While petitioner's Rule 60(b)(6) motion reasserted claims that had been previously denied on the basis of procedural default, as well as claims that had been previously denied as being without substantive merit, the thrust of petitioner's argument in this Court is directed only to the procedurally defaulted claims. Accordingly, respondent confines his argument to those claims.

28 U.S.C. § 2244(b)(1). Accordingly, "[i]f [petitioner's] current request for relief is a 'second or successive' application, then it plainly should have been dismissed." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642 (1998).[5] Petitioner advances two primary arguments for why his Rule 60(b)(6) motion is not a "second or successive application" within the meaning of § 2244(b). First, he maintains that, because these claims were denied in his original habeas proceeding on the basis of a procedural default – in his words, because they "were not adjudicated on the merits" (Pet. Br. 24) – his motion is not "second or successive" at all. Second, he asserts that he is entitled to pursue relief from the district court's habeas judgment under Fed.R.Civ.P. 60(b) (Pet. Br. 40-42), and that the "substance" of his Rule 60(b) motion was to "seek[ ] an adjudication only of his claims ... set forth in his original petition" (Pet. Br. 33), thus raising the issue of whether petitioner's Rule 60(b) motion is itself a new "application" under § 2244(b). Petitioner's arguments, however, are unavailing on both scores.[6]

[5] Although petitioner has conceded that these "are not new claims," (J.A. 169), even construing them as such, they fail to meet the requirements of § 2244(b)(2), as the Sixth Circuit ruled. (J.A. 36)

[6] Petitioner also argues that the provisions regarding second or successive petitions set forth in 28 U.S.C. § 2244(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. 104-132, 110 Stat. 1214, do not apply to his Rule 60(b) motion because his original petition was filed prior to the AEDPA's effective date. (Pet. Br. 27-28) But, as will be shown in Argument I.B, *infra*, because petitioner's Rule 60(b) motion constitutes a new habeas application, which was filed on November 2, 2001, this argument fails. *See Martinez-Villareal*, 523 U.S. at 640, 642 (applying AEDPA to decide whether petition filed in 1997 was "second or successive" under the Act, where original petition filed in 1993). *Cf. Slack v. McDaniel*, 529 U.S.

(Continued on following page)

A. The District Court's Prior Judgment, Ruling That Petitioner's Claims Were Procedurally Defaulted, "Counted" As a First Petition and Rendered The Reassertion of These Same Claims "Second or Successive" Under § 2244(b).

As a general matter, construction of statutory terms begins with the language of the statute itself. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). Where, as here, claims for habeas corpus relief are presented to a district court in an original habeas petition, and relief is denied after an evidentiary hearing, including the denial of certain claims on the ground that the claims are barred by the petitioner's procedural default, logic would dictate that any subsequent petition or application reasserting those same claims would be "second or successive" under § 2244(b) within the plain meaning of that phrase. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 649 (Thomas, J., dissenting) (under "plain meaning" of the statute, a second petition, raising the same claim presented in a first petition that had been denied, was a "second or successive habeas corpus application" under § 2244(b)).

But in *Slack v. McDaniel*, 529 U.S. 473 (2000), a majority of this Court observed that "[t]he phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases." *Id.*, 529 U.S. at 486. From

473, 479, 486 (2000) (applying pre-AEDPA law to decide whether petition filed in 1995 was "second or successive"). *See also Calderon v. Thompson*, 523 U.S. 538, 545, 546, 553 (1998) (applying AEDPA to motion to recall mandate filed in 1997, where first petition filed in 1990).

a review of prior decisions and the "established practice" in pre-AEDPA habeas cases, the *Slack* Court held that "[a] habeas petition filed in the district court after an initial habeas petition was unadjudicated on its merits and dismissed for failure to exhaust state court remedies is not a second or successive petition." *Id.*, 529 U.S. at 485-86. In so holding, the Court adhered to the analysis in *Martinez-Villareal*, where a majority of the Court likewise held, utilizing pre-AEDPA law to interpret AEDPA's provisions, that where a claim was previously dismissed as premature, a second attempt to assert the claim is not "second or successive" under 28 U.S.C. § 2244(b). *Id.*, 529 U.S. at 489 (citing *Martinez-Villareal*, 523 U.S. at 644).

Petitioner seizes upon the Court's articulation of its holding in *Slack*, and argues that, in his case too, because his claims were procedurally defaulted, he did not receive an "adjudication on the merits." But petitioner reads too much into the Court's use of the "unadjudicated on its merits" language. The words that immediately follow that phrase in the Court's opinion – "*and dismissed for failure to exhaust state remedies*" – are important. If a habeas petition that has been dismissed without prejudice for failure to exhaust state remedies has not been adjudicated on its merits, and thus does not "count" as a first habeas petition so as to render a subsequent petition "second or successive" under the intended meaning of that phrase in § 2244(b), then when has a petition or claim been adjudicated on the merits so as to "count" as a first petition? The language and legislative history of the statute, established habeas practice both before and after enactment of AEDPA, prior decisions of this Court, and the policies underlying the enactment of AEDPA's amendments to § 2244(b) all point to the conclusion that Congress

intended that any final and conclusive determination of a habeas claim, *i.e.*, a dismissal or denial *with* prejudice – the converse of the *Slack* holding – should "count" as a first petition and thus render any subsequently filed petition "second or successive" under § 2244(b).

1. Prior Decisions of This Court And Established Habeas Practice In the Vast Majority of the Circuit Courts, Both Before and After Enactment of AEDPA, Support The Conclusion That a Procedural Default Judgment Is An Adjudication On the Merits And "Counts" As a First Petition.

As this Court recently observed in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), the meaning of "on the merits" has evolved over the years. The original connotation of the phrase contemplated an adjudication "that actually 'pass[es] directly on the substance of [a particular] claim before the court.'" *Id.*, 531 U.S. at 501-02 (quoting Restatement (Second) of Judgments § 19, Comment a, p. 161 (1980)). To be sure, this Court has utilized the phrase "on the merits" to refer to the *substantive* merits of a claim. *See, e.g., Slack*, 529 U.S. at 484 (equating a court's rejection of constitutional claims "on the merits" with its having "reach[ed] the underlying constitutional claims"). That the phrase carries this connotation no doubt serves as the unstated premise of petitioner's contention that his procedurally defaulted claims were not adjudicated "on the merits."

But "on the merits" has also come to be applied to judgments that *do not* pass upon the substantive merits of a claim – those that instead are based on some other

ground that nevertheless finally determines the action. *Semtek*, 531 U.S. at 502-03. For example, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), a case involving a provision of the Securities Exchange Act that purported to authorize the reopening of actions previously dismissed as time-barred, the Court pointed out the irrelevancy of the fact that the final judgments affected by the statutory provision in question rested on a statute of limitations bar:

> The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute; as *a judgment on the merits*.

Id., 514 U.S. at 228 (citing *United States v. Oppenheimer*, 242 U.S. 85, 87-88 (1918)) (emphasis added).[7] In *Semtek* itself, the Court held that an "adjudication on the merits" under Fed.R.Civ.P. 41(b) is merely the converse of the dismissal without prejudice provided for under Fed.R.Civ.P. 41(a), *i.e.*, a dismissal *with* prejudice.[8]

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[7] *See also Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) ("[t]he dismissal for failure to state a claim . . . is a "judgment on the merits"); *McKeesport Area School Dist. v. Pennsylvania Dep't of Educ.*, 446 U.S. 970, 971 (1980) (White, J., concurring) ("a ruling of dismissal for want of a substantial federal question is a judgment on the merits").

[8] The Court in *Slack*, pointing to a court's ability to dismiss with prejudice under Rule 41(b) so as to avoid "vexatious litigation," implied that such a dismissal would bar further litigation under the successive petition doctrine. *Slack*, 529 U.S. at 489.

The dismissal or denial of a habeas claim on the basis of procedural default is properly included within this latter category of adjudications on the merits. This conclusion is dictated by the critical difference between the effect of a dismissal of a claim without prejudice for failure to exhaust state court remedies and the effect of a dismissal or denial of a claim on grounds of procedural default. In the former situation, the dismissal contemplates that the petitioner *could* return to federal court at some point in the future, either upon exhaustion of his claim in state court or upon his claim becoming ripe. *See Slack*, 529 U.S. at 486; *Martinez-Villareal*, 523 U.S. at 643. But when a claim is denied for procedural default, the petitioner cannot return to federal court – his claim is barred outright from federal habeas review, for "a state procedural default of any federal claim will bar federal habeas unless the petitioner demonstrates cause and actual prejudice." *Coleman v. Thompson*, 501 U.S. 722, 748 (1991).

Courts of appeals have pointed to this fundamental distinction between dismissals without prejudice for failure to exhaust and dismissals for procedural default to hold that a "dismissal for procedural default is a dismissal on the merits. It is critically different from a dismissal for failure to exhaust which does not prevent federal habeas review at a later date." *Harvey v. Horan*, 278 F.3d 370, 380 (4th Cir. 2002). "Unlike a procedural default, a mere failure to exhaust state remedies does not result in a dismissal 'on the merits' and does not cause a forfeiture of access to federal habeas review." *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000). *See also Turner v. Artuz*, 262 F.3d 118, 122 (2d Cir.), *cert. denied*, 122 S.Ct. 569 (2001); *Howard v. Lewis*, 905 F.2d 1318, 1322 (9th Cir. 1990); *In re Page*, 179

F.3d 1024, 1025 (7th Cir. 1999) (there is an "essential distinction" between a dismissal "for technical procedural reasons" and a dismissal "on the merits").

Petitioner contends, however, that "[t]his distinction wholly lacks substance" (Pet. Br. 33) because, "'[i]n both situations, the habeas petitioner [did] . . . not receive an adjudication of his claim.'" (Pet. Br. 34 (quoting *Martinez-Villareal*, 523 U.S. at 645)) But petitioner *did* receive an adjudication of his claim – an adjudication that he has failed properly to exhaust his claim; that he has failed to demonstrate cause and prejudice or a fundamental miscarriage of justice; and that, consequently, his right to obtain federal review of his claims is barred by the procedural default. (J.A. 60, 62, 68) As the Ninth Circuit explained in *Howard v. Lewis*:

> While a court, in dismissing a petition because of state procedural default (and a failure to show cause and prejudice), is not determining the merits of the underlying claims, *it is making a determination on the merits that the underlying claims will not be considered* by a federal court for reasons of comity. Such a determination should be considered "on the merits" for purposes of the successive petition doctrine.

905 F.2d at 1322 (citations omitted) (emphasis added). "A fundamental precept of common-law adjudication . . . is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . . " *Montana v. United States*, 440 U.S. 147, 153 (1979).

Indeed, every circuit court that has directly addressed the issue has held, both before and after enactment of

AEDPA, that a dismissal or denial of a habeas claim on grounds of procedural default constitutes an adjudication "on the merits" for purposes of determining whether a subsequent petition will be barred as second or successive. Under pre-AEDPA law, the Fifth, Eighth, Ninth and Tenth Circuits all held that a determination that a claim was procedurally defaulted constituted an adjudication "on the merits" under Rule 9(b) of the Rules Governing Section 2254 Proceedings in the United States District Courts.[9] Insofar as the language "second or successive" appears in both Rule 9(b) and in AEDPA amendments to § 2244(b),[10] Congress may be presumed to have had knowledge of this interpretation of the phrase "on the merits" for purposes of second or successive petitions when it enacted AEDPA in 1996. *See Lorillard v. Pons,* 434 U.S. 575, 581 (1978). Since enactment of AEDPA, the Second, Fourth and Sixth Circuits have followed the principle exemplified by these cases, likewise holding that a procedural default ruling is a judgment "on the merits" that renders any subsequent

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[9] *See Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995); *Bates v. Whitley*, 19 F.3d 1066, 1067 (5th Cir. 1994); *Shaw v. Delo*, 971 F.2d 181, 184 (8th Cir. 1992); *Howard*, 905 F.2d at 1323. *See also Caton v. Clarke*, 70 F.3d 64, 65 (8th Cir. 1995) ("[a] determination of an unexcused state procedural bar is a final determination on the merits for purposes of 28 U.S.C. § 2244(b)").

[10] Rule 9(b), promulgated in 1976, provides that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

petition "second or successive" under 28 U.S.C. § 2244(b).[11] Furthermore, while the Seventh Circuit has not explicitly so held, post-AEDPA decisions from that court reflect its agreement that a procedural default judgment is a judgment on the merits for purposes of applying § 2244(b).[12]

These cases serve to establish a majority rule among the circuit courts of appeal – a rule that the Second Circuit, echoing the rationale employed by the Ninth Circuit twelve years before,[13] recently had occasion to reiterate:

> We consider the denial of procedurally defaulted claims to be "on the merits" even though the underlying merits of those claims are not reviewed by any federal court because those claims, regardless of their merit, can never establish a basis for habeas relief. Thus our distinction between petitions that are denied "on the merits" and those that are not does not depend on whether the federal court actually determined the merits of the underlying claims but rather on *whether the prior denial of the petition conclusively determined that the claims presented could not establish a ground for federal habeas relief.*

Graham v. Costello, 299 F.3d 129, 133 (2d Cir. 2002) (extending principle to hold that denials of relief under the *Stone v. Powell*[14] bar to review of a Fourth Amendment claim is an adjudication on the merits) (emphasis added). In short, as the lower courts have uniformly held, "[a] petition that has reached final decision counts" for purposes of § 2244(b)'s restrictions against "second or successive" applications. *Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999).[15]

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[11] *See Harvey*, 278 F.3d at 379; *Turner*, 262 F.3d at 122; *In re Cook*, 215 F.3d at 608; *Carter v. United States*, 150 F.3d 202, 205-06 (2d Cir. 1998) (§ 2255).

[12] *See In re Page*, 179 F.3d at 1024 (distinguishing petitions dismissed for "technical procedural reasons," court noted that first petition, which included procedurally defaulted claims, "was denied on the merits"); *Benton v. Washington*, 106 F.3d 162, 164-65 (7th Cir. 1996) ("a decision on the [substantive] merits is not essential to the existence of a first petition;" while petitions dismissed for failure to pay filing fee or to permit exhaustion should be disregarded, "any other outcome is presumptively sufficient to bring § 2244(b) into play").

[13] *Sanders v. United States*, 373 U.S. 1, 16 (1963), does not aid petitioner's cause for two reasons. First, while the *Sanders* Court stated that an "adjudication of the merits" is one that follows an evidentiary hearing at which factual issues are resolved, Congress expanded that definition in 1966 to further provide that controlling effect be given a prior adjudication made "after a hearing on the merits of an issue of law." 28 U.S.C. § 2244(b) (1994). As discussed above, a procedural default judgment is rendered "on the merits of an issue of law." *See Caton*, 70 F.3d at 65. Second, as discussed in the following section, AEDPA struck all "on the merits" language from § 2244(b).

[14] 428 U.S. 465 (1976).

[15] Petitioner contends that the procedural default judgment of the district court in his case was not final until the appellate mandate was issued. While it may be correct that an appeal transfers jurisdiction to the court of appeals until issuance of the mandate, it is settled that finality attaches *for preclusion purposes* at the time of the entry of judgment in the district court, any appeal notwithstanding. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941). *See generally* 18 J. Moore, *Moore's Federal Practice*, § 131.30[2][b],[c], pp. 131-95 to -97 (3d ed. 2002). Moreover, petitioner did not appeal the procedural default rulings of the district court, thus ensuring their finality. Lastly, the appeal that petitioner *did* take had been decided, and this Court had denied certiorari, when petitioner sought to resurrect his procedurally defaulted claims.

2. Interpreting "Second or Successive" Applications to Include Subsequent Applications Filed After a Prior Procedural Default Judgment Is Consistent With The Purpose of AEDPA's Amendments to § 2244(b).

Nothing in the language or history of AEDPA's amendments to 28 U.S.C. § 2244(b) evinces a Congressional intent to exclude from the definition of a "second or successive habeas corpus application" those applications filed after a prior judgment of procedural default. The clear purpose of these amendments was to *enhance and strengthen* the pre-AEDPA restrictions on successive petitions – *not* to relax them. In addition to codifying some of the pre-existing limits on successive petitions, AEDPA "further restricts the availability of relief to habeas petitioners." *Felker v. Turpin,* 518 U.S. 651, 664 (1996). *See Dunn v. Singletary*, 168 F.3d 440, 442 (11th Cir. 1999) (purpose of AEDPA's gatekeeping provisions was "to restrict habeas petitioners from taking multiple bites of the apple"); *accord Castro v. United States*, 290 F.3d 1270, 1274 (11th Cir. 2002); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998). Pre-AEDPA law itself dictated that federal courts limit consideration of subsequent habeas petitions to "rare cases." *Kuhlman v. Thompson*, 477 U.S. 436, 454 (1986). Marking yet another step in the ongoing evolutionary process of habeas corpus law,[16] Congress clearly

[16] *Compare Sanders v. United States*, 373 U.S. 1, 8 (1963) ("res judicata is inapplicable in habeas proceedings"), *with McCleskey v. Zant*, 499 U.S. 467, 486 (1991) (1966 amendments to § 2244(b) "establishe[d] a 'qualified application of the doctrine of res judicata'") *and with Felker v. Turpin*, 518 U.S. 651, 664 (1996) (1996 amendments to

(Continued on following page)

intended, in enacting AEDPA, to limit post-judgment litigation in habeas cases to even narrower circumstances.

> This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases . . . *Successive petitions* must be approved by a panel of the court of appeals and *are limited to those petitions that contain newly discovered evidence that would seriously undermine the jury's verdict or that involve new constitutional rights that have been retroactively applied by the Supreme Court.*

Joint Explanatory Statement of the Committee of Conference, H.Conf.Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. 944 (emphasis added).[17]

§ 2244(b) "constitute a modified res judicata rule" and "the added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process").

[17] Immediately upon Senate passage of Senate Bill 735, which would be subsequently enacted into law as AEDPA, Senator Dole made the following statement regarding the legislation:

> The most critical element of this bill . . . is the provision reforming the so-called habeas corpus rules. By imposing filing deadlines on all death row inmates, and *by limiting condemned killers convicted in State or Federal court to one Federal habeas petition – one bite of the apple* – these landmark reforms will go a long, long way to streamline the lengthy appeals process and bridge the gap between crime and punishment in America. It is dead wrong that we must wait 8, or 9, or even 10 years before a capital sentence is actually carried out.

141 Cong. Rec. S7803-01, 7877 (daily ed. June 7, 1995) (statement of Sen. Dole) (emphasis added).

If there remained any doubt that Congress intended to have a claim denied on procedural default grounds "count" as a first habeas petition, Congress conclusively removed it by jettisoning all "on the merits" language from § 2244(b). As noted above, the predecessor version of § 2244(b) provided, in pertinent part:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States . . . release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ. . . .

28 U.S.C. § 2244(b) (1994). The 1996 amendments completely reworked subsection (b), replacing it with subsections (b)(1) through (b)(4). Subsection (b)(1) now provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

Period. "Congress enacted AEDPA against a backdrop of federal habeas law dealing with procedurally barred claims," *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999), and its intent on this point cannot have been any plainer. A final determination of the claims is all that is needed for the prior application to count as a first petition.

3. Policy Concerns Underlying Federal Habeas Corpus Review and the Finality of Judgments Support the Interpretation That A "Second or Successive" Habeas Application Includes a Subsequent Petition Filed After a Prior Procedural Default Judgment.

This Court has often recognized that federal habeas review of state court convictions "entails significant costs," *Wright v. West*, 505 U.S. 277, 293-94 (1992) (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982)), and that these costs, as well as the countervailing benefits, namely, a state prisoner's opportunity to obtain federal review of a state court's adjudication of federal constitutional questions, "must be taken into consideration in defining the scope of the writ." *Id.*, 505 U.S. at 291. The procedural default doctrine emanates from this cost-benefit analysis, as does the *Teague* retroactivity bar,[18] as well as the successive petition doctrine itself. *Id.*; *Sawyer v. Whitley*, 505 U.S. 333, 338-39 (1992). In the final analysis, of course, "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)).

In the interest of preserving this balance, this Court has encouraged, if not insisted, that federal courts sitting in habeas review of state court judgments dispose of presented claims on any available procedural grounds – without reaching the underlying merits. While a procedural bar issue need not "invariably" be resolved first, "it

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[18] *Teague v. Lane*, 489 U.S. 288 (1989).

ordinarily should be." *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997).

> [A]lthough federal courts at all times retain the power to look beyond state procedural forfeitures, *the exercise of that power ordinarily is inappropriate* unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and "actual prejudice resulting from the alleged constitutional violation."

Smith v. Murray, 477 U.S. 527, 533 (1986) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *Murray v. Carrier*, 477 U.S. 478, 485 (1986)) (emphasis added).[19] It would be strange indeed for a federal habeas court, having heeded such directives and adjudicated a habeas claim or petition on grounds of a state procedural default, to learn that such a judgment is not a final adjudication "on the merits" and thus is subject to endless relitigation by way of a subsequent habeas petition. Any habeas petitioner who can assemble a new argument for why he now has cause and prejudice or can now show a fundamental miscarriage of justice to excuse his prior procedural default, could relitigate the prior denial or dismissal of his claims.

Such a scenario would strip the federal judgment of any sense of finality – a circumstance that offends the very interest on which the procedural default doctrine is grounded. *See Smith*, 477 U.S. at 533; *Murray*, 477 U.S. at

[19] *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (if State argues a *Teague* retroactivity bar to habeas claim, "the court *must* apply *Teague* before considering the merits of the claim") (emphasis in original); *accord Horn v. Banks*, 122 S.Ct. 2147 (2002).

487.[20] It also would run counter to the treatment of such judgments for purposes of appeal. *See Slack*, 529 U.S. at 484 (requiring additional showing to warrant certificate of appealability that correctness of district court's procedural ruling is debatable). Moreover, such a scenario would fly in the face of what Congress intended to accomplish when it enacted AEDPA's amendments to § 2244(b). But this is the result that would attach if the phrase "second or successive" means that a prior application must have been adjudicated on the substantive merits of the claims it presented.

[20] The potential ramifications of such a holding are by no means insignificant. A 1995 Justice Department report found that 63% of the 5,000-plus habeas corpus claims reviewed were dismissed, and that 12% of these were dismissed on procedural default grounds. U.S. Dep't of Justice, Office of Justice Programs, *Federal Habeas Corpus Review, Challenging State Court Criminal Convictions* 17 (1995). While respondent's experience suggests a far higher procedural default percentage, particularly in capital cases – indeed, the report itself cautioned against making generalizations from the study's results – even these figures represent a sizable number of final judgments that would no longer be "final." In the year 2000, more than 21,000 habeas petitions were filed by state prisoners; another 9,000 some-odd petitions were filed by federal prisoners. U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoner Petitions Filed in U.S. District Courts, 2000, With Trends 1980-2000* 1 (Jan. 2002). Petitioner's insistence that his circumstances are unique (Pet. Br. 45), overlooks any number of similarly situated Tennessee prisoners who would likewise find themselves free of the restrictions against successive petitions; they too could then seek to reopen claims previously adjudicated as procedurally defaulted. In that event, the Tennessee Supreme Court would have succeeded in reducing its own discretionary review docket, but only at the expense of the federal courts' burgeoning habeas corpus docket.

B. Petitioner's Rule 60(b)(6) Motion Is Properly Construed As the Functional Equivalent of a Second or Successive Habeas Corpus "Application" Under 28 U.S.C. § 2244(b).

Petitioner, of course, did not style the pleading he subsequently filed in the district court, reasserting his procedurally defaulted habeas claims, as a petition for writ of habeas corpus. Instead, he styled this pleading a motion for relief from judgment under Fed.R.Civ.P. 60(b)(6). Petitioner maintains that such a pleading falls outside the reach of § 2244(b)'s restrictions against second or successive habeas applications. But because petitioner's pleading was, but for its title, the practical equivalent of a habeas application, relying on a new law to reassert habeas claims, the Sixth Circuit was correct to construe, and then deny, it as a second or successive habeas corpus application under § 2244(b).

Fed.R.Civ.P. 60(b) was originally adopted to provide "a new system to govern requests to reopen judgments." *United States v. Beggerly*, 524 U.S. 38, 43 (1998). The Rule provides that, "[o]n motion and upon such terms as are just," a court may relieve a party from a final judgment, order or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence;
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;

> (5) the judgment has been satisfied, released, discharged, or should no longer have prospective application, or a prior judgment on which it is based has been reversed or vacated; or,
>
> (6) any other reason justifying relief from the operation of the judgment.

These six grounds are mutually exclusive and, despite the "catch-all" nature of Clause (6), it may not be used as a vehicle for circumventing clauses (1) through (5). *Liljeberg v. Health Serv's Acquisition Corp.*, 486 U.S. 847, 863 and n.11 (1988). Accordingly, a movant seeking relief under Clause (6) – the ground invoked by petitioner – must demonstrate "extraordinary circumstances." *Klapprott v. United States*, 335 U.S. 601, 613 (1949). *See generally* 12 *Moore's Federal Practice* § 60.48[1]-[3], pp. 60-166 to -171.

In *Slack*, 529 U.S. at 489, this Court observed, in dicta, that the Federal Rules of Civil Procedure are applicable in habeas proceedings "as a general matter." At first blush, then, Rule 60(b) would appear to provide a vehicle to habeas petitioners for reopening and relitigating a previously adjudicated habeas petition and thus avoiding the clear intent of Congress in enacting AEDPA. But first blushes usually fade, and this one does as well.

1. The Provisions of Fed.R.Civ.P. 60(b) Are Not Wholly Applicable In Habeas Proceedings.

"[T]he Federal Rules of Civil Procedure apply in habeas proceedings only 'to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.'" *Browder v. Dir., Dep't of Corrections of Ill.*, 434

U.S. 257, 269 (1978) (quoting Fed.R.Civ.P. 81(a)(2)).[21] Put another way, where the practice for habeas proceedings *is* set forth by statute, that practice "takes precedence over the Federal Rules." *Id.*, 434 U.S. at 269 n.14. In *Pitchess v. Davis*, 421 U.S. 482 (1975), for example, this Court held that a new contention raised by a habeas petitioner in a post-judgment motion was subject to the statutory requirement that available state remedies be exhausted as a precondition to consideration of a federal habeas petition.[22] The Court relied upon the provisions of Fed.R.Civ.P. 81(a)(2) to reject the petitioner's argument that the statutory exhaustion requirements were inapplicable because he had asserted his claim under Fed.R.Civ.P. 60(b):

> Since the exhaustion requirement is statutorily codified, even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command.

Pitchess, 421 U.S. at 489.

Conversely, of course, where a federal statute does not provide for the practice or procedure involved in a habeas proceeding, the Federal Rules will govern. Three years after its decision in *Pitchess*, this Court held, in *Browder*, 434 U.S. 257, that the time limits for filing motions to reconsider under Fed.R.Civ.P. 52(b) and 59 applied in habeas cases. While acknowledging that "some aspects of the Federal Rules of Civil Procedure may be inappropriate

[21] Rule 11 of the Rules Governing Section 2254 Proceedings in the United States District Courts likewise provides that the Federal Rules of Civil Procedure may be applied in habeas proceedings "to the extent that they are not inconsistent with these rules."

[22] *See* 28 U.S.C. § 2254(b) and (c) (1994).

for habeas proceedings," the Court found that no habeas statute addressed the timeliness of a motion to reconsider, that the time limits set forth in the Civil Rules were "well-suited" to the special character of habeas proceedings, and that application of those time limits would be "thoroughly consistent with the spirit of the habeas corpus statutes." *Id.*, 434 U.S. at 271.

Petitioner's case presents a far different scenario than that involved in *Browder*. The practice for relitigating a previously adjudicated habeas petition is comprehensively set forth in a federal statute, namely, 28 U.S.C. § 2244(b). In § 2244(b), Congress specifically limited such renewed litigation by a habeas petitioner to that based either on new evidence or new law, and it established specific and restrictive standards to govern such litigation.[23] Where a petitioner seeks to litigate a new claim, *i.e.*, one "that was not presented in a prior application," he must show either (1) that the claim relies on a new rule of constitutional law, made retroactive by this Court, or (2) that the claim relies on newly discovered evidence that would establish, by clear and convincing evidence, that the petitioner would not have been found guilty. 28 U.S.C. § 2244(b)(2). Otherwise, the claim shall be dismissed. *Id.* Where, as here, a petitioner seeks to relitigate a prior claim, *i.e.*, one "that was presented in a prior application," he may not. The

[23] Petitioner's reliance on instances in which the government has utilized Rule 60(b) in a habeas case is misplaced. The government, of course, is not pursuing habeas relief and therefore is not seeking to circumvent § 2244(b)'s restrictions against a new "habeas corpus application."

statute requires that it be dismissed. 28 U.S.C. § 2244(b)(1).

Moreover, to the extent that a direct conflict exists between the provisions of 28 U.S.C. § 2244(b) and Fed.R.Civ.P. 60(b), the two cannot mutually coexist. Rule 60(b)(2), while not at issue in this case, represents the most obvious example of inconsistencies between the two laws. That clause of the Rule provides, on its face, for relief from judgment on the basis of newly discovered evidence. But this rule runs headlong into § 2244(b)(2)'s provisions for the litigation of new claims relying on newly discovered evidence. Furthermore, Rule 60(b)(2) runs completely counter to § 2244(b)(1)'s provisions, which prohibit *any* reliance by a petitioner on newly discovered evidence to relitigate previously presented claims.

Rule 60(b)(6) – the ground on which petitioner based his Rule 60(b) motion – likewise conflicts with § 2244(b) insofar as the Rule provides for relief from judgment on the basis of new law. While "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)," *Agostini v. Felton*, 521 U.S. 203, 239 (1997), changes in decisional law, when combined with other factors, might warrant relief, as may unexpected changes in statutory law. *See* 12 *Moore's Federal Practice*, § 60.48[5][b]-[d], pp. 60-181 to -184, and cases cited. Indeed, petitioner's 60(b) motion, which relies on the intervening promulgation of Tenn.Sup.Ct.R. 39, seeks to invoke relief under Clause (6) on just such a basis. But again, any ability of a petitioner to rely on new law as the basis for a motion under Rule 60(b)(6) conflicts directly with § 2244(b)(2), which restricts litigation of new claims to those relying on new rules of constitutional law that have been made retroactive.

Similarly, because § 2244(b)(1)'s uncompromising terms prohibit *any* reliance by a petitioner on new law to relitigate previously presented claims, Rule 60(b)(6) also creates a conflict with this provision of the habeas statute.[24] This inconsistency between the statute and the Civil Rule demands that Rule 60(b) give way and that § 2244(b) take precedence. *Cf. Browder,* 434 U.S. at 271. Accordingly, where a habeas petitioner utilizes Rule 60(b) to raise new claims, new evidence or new law, his motion is properly construed as a second or successive habeas petition subject to § 2244(b)'s restrictions. A contrary conclusion would allow Rule 60(b) to "alter the statutory command." *Pitchess,* 421 U.S. at 489.

Deference to the primacy of § 2244(b)'s provisions in the context of post-judgment habeas litigation makes perfect sense from a policy standpoint. Rule 60(b) represents a "balancing of [the] need for justice against [the] value of finality of judgments," 12 *Moore's Federal Practice* § 60.02[2], p. 60-21 n.6,[25] but it is necessarily a balance that has been struck in the context of a typical civil case. By contrast, habeas corpus review, as previously discussed, involves other costs and benefits that do not present themselves in the typical civil case. *See Coleman*,

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[24] To the extent that new law may also be relied upon as the basis for a motion under Rule 60(b)(1) alleging "mistake, inadvertence, surprise or excusable neglect" (*see Morris v. Adams-Millis Corp.*, 758 F.2d 1352, 1358-59 (10th Cir. 1985) and cases cited; 12 *Moore's Federal Practice* § 60.41[4][b], pp. 60-102 to -113), the same conflict exists between the Civil Rule and the Habeas Statute.

[25] *See Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 271 (3d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3093 (U.S. July 2, 2002) (No. 02-54).

501 U.S. at 747-48; *see also Browder*, 434 U.S. at 269 ("[p]erhaps in recognition of the differences between general civil litigation and habeas corpus proceedings," Fed.R.Civ.P. 81(a)(2) limits application of the Civil Rules where the practice is set forth by statute). As discussed above, § 2244(b), particularly after its amendment by AEDPA, represents Congress' view of the appropriate balance to be struck in the habeas context when it comes to allowing any additional litigation after a habeas petition has been decided. This balance ought not be upset by overlaying and frustrating the statute's provisions with rules that have been established with other interests in mind.

2. Subjecting Rule 60(b) Motions That Raise New Claims, New Evidence or New Law To the Restrictions Against Second or Successive Habeas Petitions Is Consistent With Prior Decisions of This Court and the Vast Majority of the Circuit Courts.

This Court has previously expressed its unanimous support for the proposition that a second or successive habeas petition may not be filed under the guise of some other post-judgment pleading. In *Calderon v. Thompson*, 523 U.S. 538 (1998), a case involving a habeas petitioner's motion in the Ninth Circuit Court of Appeals to recall the mandate on the basis of new evidence, the Court determined that a habeas petitioner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). "Otherwise, petitioners could evade the bar against relitigation of claims

presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Id.*, 523 U.S. at 553.[26] *See Gomez v. U.S. Dist. Ct. N.D. Calif.*, 503 U.S. 653 (1992) (state prisoner's use of 42 U.S.C. § 1983 action to raise new claim challenging method of execution was "an obvious attempt to avoid" the bar against successive claims).

While the four-member minority in *Calderon* disagreed regarding the appropriate standard that should govern review of a circuit court's recall of its mandate, even the dissenting opinion admits that "[a]ll would agree . . . that the sua sponte recall of mandates could not be condoned as a mechanism to frustrate the limitations on second and successive habeas petitions." *Calderon*, 523 U.S. at 569 (Souter, J., dissenting). In a footnote immediately following this statement, the dissent observes:

> The Ninth Circuit itself seems to recognize that a motion to recall the mandate filed by a petitioner subsequent to a previous request for federal habeas relief is analogous to a second or successive petition that is subject to the constraints of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

Id., 523 U.S. at 569 n.1 (citing *Nevius v. Sumner*, 105 F.3d 453, 461 (9th Cir. 1996)).

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[26] The majority went on to conclude, however, that § 2244(b)'s restrictions did not apply because the mandate had been recalled on the exclusive basis of the petitioner's first habeas petition. Nevertheless, the majority did hold that a *sua sponte* recall of the mandate under such circumstances must be done in a manner consistent with the objects of the statute. *Calderon*, 523 U.S. at 554.

The Ninth Circuit is far from alone in this view. "Appellate courts agree that a post-judgment motion under Fed.R.Civ.P. 60(b) in the district court, or the equivalent motion in the court of appeals – which is to say, a motion to recall the mandate – is a 'second or successive' application for purposes of § 2244(b)." *Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997) (citing *Ruiz v. Norris*, 104 F.3d 163 (8th Cir. 1997); *Felker v. Turpin*, 101 F.3d 657 (11th Cir. 1996); *Mathenia v. Delo*, 99 F.3d 1476 (8th Cir. 1996)). *See United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998) ("there is a trend among circuit courts to look beyond the formal title affixed to a motion if the motion is the functional equivalent of a motion under § 2255"). Indeed, every circuit court to have addressed this issue – save one – has ruled that a post-judgment motion in a habeas case, whether that motion be a Rule 60(b) motion in the district court or a motion to remand or to recall the mandate in the court of appeals, that raises new claims, new evidence or new law is properly treated or construed as the functional equivalent of a second or successive habeas corpus petition.[27]

[27] *See Thompson v. Nixon*, 272 F.3d 1098, 1100 (8th Cir. 2001), *cert. dismissed*, 122 S.Ct. 1988 (2002) (motion to recall mandate; new law); *Gray-Bey v. United States*, 209 F.3d 986, 988 (7th Cir. 2000) (motion to recall mandate; new claims); *Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (en banc) (60(b) motion; new evidence); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (60(b) motion; new law); *Rich*, 141 F.3d at 552 (60(b) motion; new law); *Burris*, 130 F.3d at 783 (motion to recall mandate; new evidence); *Felker*, 101 F.3d at 660 (60(b) motion; new evidence); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) (60(b) motion; new claims); *Hunt v. Nuth*, 57 F.3d 1327, 1339 (4th Cir. 1995) (60(b) motion; new claims); *Guinan v. Delo*, 5 F.3d 313, 317 (8th Cir. 1993) (60(b) motion; new evidence); *Kyles v. Whitley*, 5 F.3d 806, 808 (5th Cir. 1993), *rev'd on other grounds*, 514 U.S. 419 (1995) (60(b)

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These decisions are based on the same rationale endorsed by all nine members of the Court in *Calderon* – that a habeas petitioner should not be allowed to avoid the restrictions against second or successive petitions. "Otherwise the statute would be ineffectual. Instead of meeting the requirements of § 2244(b), the petitioner would restyle his request as a motion for reconsideration in the initial collateral attack and proceed as if the AEDPA did not exist." *Burris*, 130 F.3d at 783.

> Rule 60(b) cannot be used to circumvent restraints on successive habeas petitions. That was true before the [AEDPA] was enacted, and it is equally true, if not more so, under the new act.

Felker v. Turpin, 101 F.3d at 661. *See Bonin v. Vasquez*, 999 F.2d 425, 426 (9th Cir. 1993) ("a Rule 60(b) motion following the entry of final judgment in a habeas case raises policy concerns similar to those implicated by a second petition").[28]

motion; new claims); *Clark v. Lewis*, 1 F.3d 814, 825-26 (9th Cir. 1993) (60(b) motion; new claim); *Williams v. Whitley*, 994 F.2d 226, 230 and n.2 (5th Cir. 1993) (60(b) motion; new law); *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992) (60(b) motion; new claims); *Jones v. Murray*, 976 F.2d 169, 173 (4th Cir. 1992) (60(b) motion; new law); *Smith v. Armontrout*, 888 F.2d 530, 540 (8th Cir. 1989) (motion to remand; new claims); *Lindsey v. Thigpen*, 875 F.2d 1509, 1515 (11th Cir. 1989) (60(b) motion and motion to recall mandate; new law and new claims). *See also Landano v. Rafferty*, 897 F.2d 661, 668 and n.10 (3d Cir. 1990) (evaluating 60(b) motion as habeas petition to require exhaustion and viewing reopening of habeas petition by this method "problematic").

[28] *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001) stands alone in the minority view. But *Rodriguez*' two rationales are not persuasive. The first – that, unlike a habeas petition, a Rule 60(b)

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3. Petitioner's Rule 60(b) Motion Raises New Law to Reassert Previously Presented Claims For Habeas Corpus Relief.

Petitioner's Rule 60(b) motion reintroduces several of the habeas claims that were presented in his original petition; it also raises and relies upon Tenn.Sup.Ct.R. 39 as support for doing so. It cannot be seriously disputed that Rule 39 is a new law. The rule was promulgated by the Tennessee Supreme Court on June 28, 2001; it did not even exist at the time that petitioner's original petition was filed or decided. Petitioner himself has admitted that the promulgation of Rule 39 "made [the] Rule 60(b) motion possible," (J.A. 184 n.2); prior to the Rule's promulgation, petitioner had no basis for seeking to renew these claims.

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motion "seeks only to vacate the federal court judgment dismissing the habeas petition" and thus "merely ... open[s] the way for further proceedings seeking ultimately to vacate the conviction," *id.*, 252 F.3d at 198 – begs the question. Even if a Rule 60(b) motion "merely ... open[s] the way" to a renewed challenge to the state court conviction, it is the very "way" that the restrictions against successive petitions were intended to close. The second – that "the grounds asserted in support of the motion under Rule 60(b) may well have nothing to do with the alleged violations of federal rights ... asserted as a basis for the habeas," *id.*, 252 F.3d at 199 – ignores the fact that the habeas judgment itself "may well have nothing to do with the alleged violations of federal rights ... asserted as a basis for habeas," but is nonetheless a final, conclusive judgment. It renders any new effort to relitigate it "second or successive." *See Williams*, 994 F.2d at 230 and n.2 (assertion of new law to challenge denial under *Teague* non-retroactivity rule "best viewed as yet another habeas petition"); *Bolder v. Armontrout*, 983 F.2d 98, 99 (8th Cir. 1992) (assertion of new argument for cause to excuse procedural bar treated as "the equivalent of a second petition").

Nonetheless, petitioner argues that Rule 39 is not a new law at all; he contends that Rule 39 serves merely to "clarify" existing law in Tennessee regarding what steps a prisoner must take in state court in order to exhaust available remedies for purposes of federal habeas review. But even if petitioner were correct on this point – and he most assuredly is not[29] – his point is irrelevant. The only relevant inquiry is whether some new matter – a new law, new evidence, or a new claim – has been presented to the court for consideration that was not previously before the court when it entertained the original habeas application. As this Court discussed in *Calderon*, 523 U.S. at 554, the

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[29] There is no evidence to support petitioner's contention that, prior to the promulgation of Rule 39, discretionary review by the Tennessee Supreme Court was in any way unavailable as part of the regular appellate process or that a state prisoner did not need to pursue that remedy in order to exhaust available state remedies for purposes of federal habeas review. *See* Argument, Sec. II.B., *infra*. Indeed, even before this Court's decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the rule in the Sixth Circuit was clearly to the contrary. *See Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). Petitioner, of course, chose not to appeal the procedural default rulings of the district court – a choice that not only belies his current assertion that Rule 39 "reflects existing law" (Pet. Br. 35), but that also warrants a conclusion that petitioner has abused the writ. *See Dugger v. Johnson*, 485 U.S. 945 (1988) (O'Connor, J., dissenting from denial of motion to vacate stay of execution) ("the State is clearly correct to argue that the writ of habeas corpus is abused when a claim is raised in one petition, abandoned on appeal, and then raised again in a successive petition).

crucial question is whether new matters have been considered, or presented for consideration, by the court. Noting that the Ninth Circuit had been "specific in reciting that it acted on the *exclusive basis* of [the petitioner's] first federal habeas petition," and that this recitation "[was] not disproved by *consideration of matters presented in a later filing*," *id.* (emphasis added), this Court ruled that the Ninth Circuit's recall of the mandate "did not contravene the letter of AEDPA." *Id.* The Court pointed out, however, that "had the court considered claims or evidence presented in [the petitioner's] later filings, its action would have been based on a successive application, and so would be subject to § 2244(b)." *Id.*[30]

> The en banc court based its decision only on the claims and evidence presented in Thompson's first petition for federal habeas relief. Had it considered the additional evidence or claims presented in Thompson's motion to recall the mandate, of course, its decision would have been subject to § 2244(b).

[30] Petitioner has previously focused on the Court's reference here to a habeas court's consideration of "*claims or evidence*" in later filings, to the exclusion of the Court's reference to "consideration of *matters* presented in a later filing" (emphasis added), and suggested that the Court's ruling in *Calderon* was limited to post-judgment motions raising new claims or new evidence. But the Court's focus in *Calderon* was clearly on whether the Ninth Circuit's recall of the mandate was based exclusively on matters presented in the first habeas application, as opposed to a second, *i.e.*, the recall motion. The Court made no reference to new law simply because no new law was raised by Thompson's recall motion. Indeed, there is no logical justification for treating a post-judgment motion raising new claims or new evidence as a successive habeas application, but not so treating a like motion that renews the request for habeas relief by raising a new law. The latter effort is just as much the "second bite of the apple" that Congress sought to prohibit.

523 U.S. at 562. *See Burris*, 130 F.3d at 783-84, 785 (noting distinction between "readjudicat[ing] old arguments" and "determin[ing] the effect of new evidence and arguments"; "reassessing old theories in light of new evidence" is a step forbidden by § 2244(b)). Thus, where a Rule 60(b) motion relies on new law to assert or reassert claims for habeas relief, the question is only whether that law was presented as part of petitioner's original petition.

Petitioner's argument that Rule 39 is not "new" addresses a different question. He is suggesting that Rule 39 does not announce "a new rule of law," as under the *Teague*[31] retroactivity analysis or under the analysis required by 28 U.S.C. § 2244(b)(2). *See Tyler v. Cain*, 533 U.S. 656, 662 (2001). But this argument is beside the point, because it does not address, much less alter, the fact that petitioner did not present Rule 39 as part of his original petition.[32] Indeed, his effort to resurrect claims in that petition "rests upon a state procedural rule, adopted three years after the district court's judgment" (J.A. 36) (emphasis added), and thus constitutes a new habeas application.

[31] 489 U.S. 288.

[32] *See Gray-Bey*, 209 F.3d at 989 (post-judgment motion relying on new law treated as successive petition, but authorization to file same denied because the new law "did not announce a new rule of constitutional law"); *Rich*, 141 F.3d at 553 (same); *Ruiz*, 104 F.3d at 165 (same).

II. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN REFUSING TO WITHHOLD THE MANDATE, MODIFY ITS JUDGMENT, OR REMAND THE CASE TO THE DISTRICT COURT.

Petitioner contends that, regardless whether the court of appeals erred in its treatment of his Rule 60(b) motion as a second or successive habeas petition, it abused its discretion in denying his "Motion to Withhold the Mandate and Grant Rehearing En Banc or Remand for Further Proceedings." The argument is without merit for a number of reasons.

A. Petitioner's Motion In the Court of Appeals Was the Equivalent of a Request to Recall the Mandate, Which Constituted a "Second or Successive" Application Under 28 U.S.C. § 2244(b).

Following the disposition of the habeas case by the three-judge panel on September 13, 2000, the court of appeals denied rehearing and a suggestion for rehearing en banc on December 22, 2000, but stayed the issuance of the mandate pending a petition for a writ of certiorari. This Court denied certiorari on October 9, 2001. Petitioner's motion, requesting that the mandate be withheld and en banc rehearing granted or, in the alternative, that the case be remanded to the district court for further proceedings, was filed with the court of appeals the next day. A copy of this Court's order denying certiorari was filed with the clerk of the court of appeals on October 16.

Rule 41(d)(2)(D), Federal Rules of Appellate Procedure, provides that "[t]he court of appeals must issue the mandate immediately when a copy of a Supreme Court

order denying the petition for a writ of certiorari is filed." Thus, upon the filing of a copy of this Court's order on October 16, the issuance of the mandate by the court of appeals was a ministerial act that it was compelled to perform under Rule 41(d)(2)(D). *See also* 16A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3987.1, p. 744 (3d ed. 1999) (If the Supreme Court denies certiorari, "the stay is automatically dissolved and the rule directs that the court of appeals 'must issue the mandate immediately' when a copy of a Supreme Court order denying the petition for a writ of certiorari is filed"). Therefore, to stay the mandate following denial of certiorari is an extraordinary act tantamount to a decision by a court of appeals to recall the mandate. *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992) (en banc); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989).

While the courts of appeals are recognized to possess an inherent power to recall their mandates, subject to review for an abuse of discretion, the power can be exercised only in "extraordinary circumstances." *Calderon*, 523 U.S. at 549-50. "The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* at 550. A court of appeals abuses its discretion when it recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief "unless it acts to avoid a miscarriage of justice as defined by [this Court's] habeas corpus jurisprudence." *Id.* at 558. "'[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.'" *Id.* at 559 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)). Thus, if the petitioner asserts his actual innocence of the underlying crime, "he must show 'it is more likely

than not that no reasonable juror would have convicted him in light of the new evidence. . . . '" *Id.* at 559 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). If the petitioner challenges his death sentence, "he must show 'by clear and convincing evidence' that no reasonable juror would have found him eligible for the death penalty in light of the new evidence." *Id.* at 559-60 (quoting *Sawyer*, 505 U.S. at 348).

As previously demonstrated in Argument I, a motion to recall the mandate can be regarded as a second or successive application for purposes of 28 U.S.C. § 2244(b). *Calderon*, 523 U.S. at 553; *Burris*, 130 F.3d at 784 ("a motion filed in the court of appeals after the time for rehearing has expired (or rehearing has been sought and denied) may be granted only if it meets the substantive criteria of § 2244(b)(2)"). Indeed, petitioner sought to achieve the same thing by way of his motion filed in the court of appeals as he sought by way of his Rule 60(b) motion filed in the district court: the fifth ground in petitioner's motion in the Sixth Circuit also sought review, in light of the adoption of the Tennessee Supreme Court's Rule 39, of the district court's determination that certain prosecutorial misconduct claims were procedurally defaulted. Although the procedurally defaulted claims were not part of the court of appeals' judgment,[33] petitioner's motion bore all of the hallmarks of a motion for leave to file a second or successive petition in the district court under § 2244(b)(3)(B). And, for the reasons stated in Argument I.A.1, *supra*, the district court's procedural default

[33] The court of appeals noted that "the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." (J.A. 39)

ruling was a "merits" determination. Therefore, the assertion that the district court's resolution of the prosecutorial misconduct claims was incorrect was also on the basis of the "merits." Section 2244(b)(1) is clear that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." Because petitioner's motion constituted a second or successive application under § 2244(b)(1), it was required to be dismissed. It necessarily follows that the court of appeals' denial of the motion could not have been an abuse of discretion.

But even if petitioner's motion was not subject to § 2244(b), petitioner cannot demonstrate an abuse of discretion by the court of appeals in refusing to recall its mandate. The premise upon which *Calderon* rests is the State's interest in finality. This Court began its analysis in *Calderon* by stressing the extraordinary nature of the act of recalling the mandate "[i]n light of the 'profound interest in repose' attaching to the mandate of a court of appeals." *Calderon*, 523 U.S. at 549-50 (quoting 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3938, p. 712 (2d ed. 1996)). Citing several examples of the Court's imposition of significant limits on the discretion of federal courts to grant habeas relief, *Calderon*, 523 U.S. at 554-55, the Court observed that "[t]hese limits reflect our enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court system,'" *id.* at 555 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)); and that "[f]inality is essential to both the retributive and the deterrent functions of criminal law," "enhances the quality of judging," and "serves as well to preserve the federal balance." *Calderon*, 523 U.S. at 555. Focusing on a

federal court of appeals' mandate, the Court recognized that

> [a] State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief. At that point, having in all likelihood borne for years "the significant costs of federal habeas review," the State is entitled to the assurance of finality. When lengthy federal proceedings have run their course and a mandate denying relief has issued, finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," an interest shared by the State and the victims of crime alike.

Id. at 556 (internal citations omitted). In cases where a court of appeals recalls its mandate to revisit the merits of its earlier decision denying habeas relief, "the State's interests in finality are all but paramount, without regard to whether the court of appeals predicates the recall on a procedural misunderstanding or some other irregularity occurring prior to its decision." *Id.* at 557. Because the prisoner has already had extensive review of his claims, absent a strong showing of actual innocence "the State's interests in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for review." *Id.*

In this case, the court of appeals *declined* to recall its mandate. A decision refusing to recall a mandate fosters, rather than frustrates, the State's "all but paramount"

interest in finality. Where a court of appeals refuses to recall its mandate, there has been no abuse of discretion under *Calderon's* principles. Petitioner cannot demonstrate an abuse of discretion by the court of appeals in denying his motion.

Furthermore, even if subjected to *Calderon's* abuse of discretion test, the court of appeals' refusal to recall the mandate was not an abuse of discretion. In requesting that the mandate be withheld, petitioner relied primarily on an intervening procedural rule adopted by the Tennessee Supreme Court on the exhaustion of state remedies, allegedly demonstrating that the district court had erred in finding his prosecutorial misconduct claims procedurally defaulted. (J.A. 153) This ground was legal, not factual, and, therefore, plainly insufficient to justify a recall of the mandate under *Calderon's* "actual innocence" standard.[34] *Calderon,* 523 U.S. at 559 ("the miscarriage of justice exception is concerned with actual as compared to legal innocence") (quoting *Sawyer*, 505 U.S. at 339).

B. The Court of Appeals' Denial of the Motion Was Not Otherwise An Abuse of Discretion.

But even if petitioner's motion is viewed simply as an ordinary motion – and not a motion to recall the mandate

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[34] The motion's other four grounds, asserting error in the panel's disposition of the claim of ineffective assistance of counsel at the sentencing phase, based upon alleged conflicts between the panel decision and certain decisions of this Court, alleged conflicting decisions of the Sixth Circuit, and perceived inconsistencies in the State's arguments made in the court of appeals, were likewise legal, not factual.

and a second or successive application under § 2244(b) – the court of appeals did not abuse its discretion in denying it. Contrary to petitioner's assertions, the court of appeals was not "obliged to give effect to" Rule 39.

In the first place, petitioner clearly waived his challenge to the district court's procedural default ruling on his prosecutorial misconduct claims when he did not appeal the issue. He candidly admitted that he did not challenge the district court's procedural default determinations, "principally because he had prevailed in the district court, and also because substantial page limits constrained the number of points he could raise."[35] (J.A. 155) Under prevailing Sixth Circuit precedent, by failing to contest the district court's denial of the prosecutorial misconduct claims for procedural default, petitioner waived his right to appellate review of the claims. *See White Consol. Indus., Inc. v. Westinghouse Elec. Corp.*, 179 F.3d 403, 407-408 (6th Cir. 1999). *See also* Fed.R.App.P. 28(a) (requiring that an appellant's brief include "a statement of the issues presented for review" and an "argument" containing "appellant's contentions and the reasons for them. . . . "). Indeed, in denying the motion, the court of appeals clearly acknowledged that the issue had never been before the court, remarking that "the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." (J.A. 39)

[35] Petitioner prevailed in the district court only as to the death sentence but not the conviction for first degree murder, and the majority of his prosecutorial misconduct claims arise in connection with the guilt phase of the trial. (J.A. 155)

Because petitioner had not even challenged the district court's procedural default ruling on appeal, and because the issue was raised for the first time in petitioner's motion, the court of appeals cannot be faulted for refusing to grant extraordinary relief.[36] Petitioner's sweeping assertion that "the courts of appeals uniformly recognize that the denial of certiorari does not affect their power and duty to modify their judgments to account for intervening legal developments" (Pet. Br. 39) ignores a pertinent fact present in the decisions he cites: the issue was before the court of appeals in the first place. In fact, in all of the cases relied on by petitioner, the intervening legal developments warranting extraordinary relief bore directly on issues raised and thoroughly litigated in the case before the court of appeals.[37] Here, by contrast,

[36] *See United States v. Barela*, 571 F.2d 1108, 1115 (9th Cir. 1978) (Ferguson, J., dissenting) (viewing government's second petition for rehearing as motion to recall mandate, but noting that, since question presented was neither raised in original appeal nor on first petition to rehear, "[e]ven viewing the present proceedings as a simple petition for rehearing, we would be justified in declining to consider a question so belatedly raised").

[37] *See, e.g., Sargent v. Columbia Forest Prod., Inc.*, 75 F.3d 86, 88-90 (2d Cir. 1996) (after affirming dismissal of retaliatory discharge claim based on court of appeals' interpretation of state law, mandate recalled to revisit issue following inconsistent decision by the state's supreme court, when appellant "not only made the argument that prevailed" in state supreme court, but "brought to our attention" that case was pending there); *First Gibraltar Bank v. Morales*, 42 F.3d 895, 896-97 (5th Cir. 1995) (after accepting appellant's federal preemption argument, court of appeals vacates judgment prior to issuance of mandate when new federal legislation makes clear no preemption of state law); *Bryant*, 886 F.2d at 1527-30 (after concluding district court lacked subject matter jurisdiction, court of appeals vacates judgment prior to issuance of mandate when intervening federal legislation modifies jurisdictional requirements); *Zipfel v. Halliburton Co.*, 861

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petitioner had never preserved for review the issues he presented in his motion. Petitioner can hardly complain that the court of appeals' refusal to afford him extraordinary relief was an abuse of discretion.

In any event, application of Rule 39 would not have revived petitioner's prosecutorial misconduct claims deemed procedurally defaulted by the district court for petitioner's failure to present them to the Tennessee Supreme Court. In *Boerckel*, this Court held that a discretionary application to a state's highest court is ordinarily an "available" state remedy which must be exhausted under 28 U.S.C. § 2254(b) and (c) but that "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is *not available*." 526 U.S. at 847-48 (emphasis added). The fatal flaw in petitioner's reasoning is that Rule 39 does not make discretionary review unavailable in criminal cases.

Rule 39 provides, in pertinent part:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant *shall not be required* to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

F.2d 565, 567-68 (9th Cir. 1988) (court of appeals recalls mandate after Supreme Court decision demonstrates court applied wrong analysis to appellant's claims); *Alphin v. Henson*, 552 F.2d 1033, 1034-36 (4th Cir. 1977) (court vacates judgment prior to issuance of mandate in light of intervening change in law regarding award of attorneys' fees, where "the subject of plaintiff 's claim to attorneys' fees has been the subject of litigation throughout").

(emphasis added). This rule is simply a declaration by the Tennessee Supreme Court that, in its view, an application for permission to appeal to that court is unnecessary in order to satisfy § 2254's exhaustion requirement. But nothing in the rule makes discretionary review unavailable to criminal litigants. Indeed, an application for permission to appeal under Rule 11, Tenn.R.App.P., remains available to all litigants: "an appeal by permission may be taken from a final decision of the Court of Appeals or the Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court . . . ." Rule 11(a), Tenn.R.App.P. The Advisory Commission Comment to Rule 11, amended after the adoption of Rule 39, points out that Rule 39 "works no change to Tenn.R.App.P. 11 itself." Moreover, even if Rule 39 could be said to have rendered discretionary review under Rule 11 "unavailable" under *Boerckel* as of the date of its promulgation, it cannot be applied retrospectively. The Tennessee Supreme Court cannot alter the objective historical fact that such review was available in 1995 – the time of petitioner's state post-conviction appeal. *See Wenger v. Frank*, 266 F.3d 218, 226 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 1364 (2002). Accordingly, because Rule 39 could not resurrect petitioner's procedurally defaulted prosecutorial misconduct claims, they would have been

dead on arrival in the district court in the event of a remand from the court of appeals.

CONCLUSION

The judgments of the court of appeals should be affirmed.

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Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

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ARGUMENT

I. Respondent and its *Amici* Agree that the Lower Courts' Sole Ground for Denying 60(b) Relief Was Erroneous.

The opposing briefs substantially narrow the issues before the Court by declining to defend the only reason given below for denying petitioner's Rule 60(b) motion—that every 60(b) motion in a post-AEDPA habeas case is *eo ipso* a successive application within the preclusion rules of 28 U.S.C. § 2244. JA 36, 40. Expressly rejecting that "stark" and unprecedented rule as inconsistent with the Court's decisions,[1] respondent and *amici* list several extraordinary situations in which they concede that a Rule 60(b) motion is not a "second or successive application" within § 2244: (1) Where the challenged habeas judgment "preclude[d]" "one round of federal review," including a "'dismiss[al] for failure to exhaust.'" CJLF 13, 16; RB 15 (citing *Slack v. McDaniel*, 529 U.S. 473 (2000)). (2) "Denial of the petition based on [a] defect in pleading without giving the petitioner an opportunity to amend."[2] (3) Where "a claim was previously dismissed as premature." RB 12 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998)). (4) Where the petition was dismissed "for failure to pay [a] filing fee" or other "'technical procedural reasons.'" RB 15-16, 18 n.12. (5) Where a 60(b) motion asks the court only to "'readjudicat[e] old arguments,'" not to "'determin[e] the effect of new evidence and arguments'" or to "'reassess[] old theories in light of new evidence'"—*i.e.*, where the motion seeks action "'on the exclusive basis of [the] first federal habeas petition.'" RB 38-39 (quoting

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[1] Brief of Criminal Justice Legal Foundation (CJLF) 6. *See* Respondent's Brief (RB) 31; Brief of Alabama *et al.* (AB) 16-17. Petitioner does not argue that all Rule 60(b) motions challenging habeas denials based on grounds other than the underlying merits avoid a § 2244 bar. *Cf.* RB 9-25. Rather, he shows that his 60(b) motion is one of the very few motions seeking to reopen a habeas denial on *any* ground that is not barred by § 2244.

[2] CJLF 11-12 (citing *Sanders v. United States*, 373 U.S. 1 (1963)); *see Haro-Arteaga v. United States*, 199 F.3d 1195, 1196-97 (10th Cir. 1999) (citing cases).

Calderon v. Thompson, 523 U.S. 538, 554 (1998)). (6) Where 60(b) relief is sought because the original denial was procured by "fraud on the court" or by "prosecution misconduct depriving petitioner of evidence" that refutes the factual basis for denying relief, or where for some other reason there is "no legitimate expectation of finality … [or] legitimate judgment." CJLF 6, 9 (citing *Calderon*, 523 U.S. at 557 ("fraud upon the court, calling into question the very legitimacy of the judgment")).

With the issues thus narrowed, the path to proper decision is guided by the following propositions, developed *infra*: The opposing briefs offer no general rule to determine when a 60(b) motion should or shouldn't be deemed a successive application. They do not improve upon the criterion the Court has already announced, that a post-judgment motion is within § 2244 when it is the functional equivalent of a "second or successive application" for relief, rather than the same application. *Martinez-Villareal*, 523 U.S. at 643-44. Their failure to articulate any other comprehensive principle supports the conclusion of every circuit but the Sixth, that the line between 60(b) and § 2244 does not lend itself to a one-size-fits-all rule. Two conditions explain most habeas situations in which the courts have rightly found that 60(b) and § 2244 do not conflict: (1) *Reconsideration under 60(b) is sought because a crucial premise of the judgment withholding habeas relief is shown to be transitory or illusory.* (2) *The 60(b) motion raises no new issue of fact or law that goes beyond the four corners of the original habeas application, yet commands consideration that it has not yet received.* Because of the clear terms and particular timing of Tennessee Supreme Court Rule (TSCR) 39—on which petitioner's 60(b) motion relies—his motion is unusual in having *both* of these characteristics. Respondent's attempt to censure Rule 39 as ill-motivated or irrelevant inverts every canon of comity and federalism. Finally, petitioner's 60(b) motion is the very rare one that stays within the four corners of the original habeas petition but *also* satisfies the demanding criteria of Rule 60(b) itself.

II. The Opposing Briefs Offer No Usable Rule for Determining When a 60(b) Motion Is or Is Not "Successive."

In attempting to uphold the decision below despite the error of its *per se* predicate, respondent and *amici* cite this Court's decisions holding that the Civil Rules governing post-judgment motions apply in habeas whenever they do not conflict with the habeas statute. *See* RB 28; AB 10; CJLF 6-7. *Compare Pitchess v. Davis*, 421 U.S. 482, 489 (1975) (declining to apply Rule 60(b) where it would "alter the command" of the statute) *with Browder v. Director*, 434 U.S. 257, 271 (1978) (applying Rules 52(b) and 59 where doing so was in "conformity [with] habeas corpus … proceedings") *and Slack v. McDaniel*, 529 U.S. at 489 ("the Federal Rules of Civil Procedure [are] applicable as a general matter to habeas cases"—they fittingly "vest the federal courts with due flexibility to prevent vexatious litigation").

When attempting to articulate a rule more comprehensive than these holdings, however, respondent and its *amici* indefensibly treat merely *relevant* factors as *decisive*. As the Court's caselaw makes clear, neither of the factors they propose—that the prior judgment was "without prejudice," and that the 60(b) motion cites no "new matter"—is controlling.

1. A hard-and-fast line between judgments that were and were not designated as "without prejudice" when entered is inconsistent with *Slack* and *Martinez-Villareal*. There, the Court endorsed the lower courts' "established practice" of excluding from the category of "second or successive" applications "'a habeas petition filed after a previous petition has been dismissed on exhaustion grounds" and "dismissal of a first habeas petition for technical procedural reasons." *Slack*, 529 U.S. at 488; *Martinez-Villareal*, 523 U.S. at 645. In so ruling, the Court never used the term of art "without prejudice" to identify the only "dismissals" to which the established practice applies; the words "without prejudice" do not appear in *Martinez-Villareal*.

And for good reason. A rule that hinges on such a formality is directly at odds with the Court's resolutely functional ap-

proach to what is and is not "successive." *Slack*, 529 U.S. at 487-88; *Martinez-Villareal*, 523 U.S. at 643; *Calderon*, 523 U.S. at 554. Not surprisingly, the lower-court cases establishing the functional practice that the Court has endorsed do not all involve without-prejudice dismissals.[3]

Nor would a formalistic approach work. In many cases, a federal court cannot tell, when it withholds relief, whether the reason for doing so is permanent or not. A failure to plead facts with the specificity required by Habeas Rule 2(c) may be inadvertent and curable (in which case the dismissal does not render subsequent applications "successive," *see* CJLF 11-12 (citing authority)), or it may be because there are no facts that support petitioner's claims (in which case, a later application is "successive").[4] Habeas dismissals often occur because a petitioner's claims were not previously raised in the state courts, and the district court cannot tell whether state remedies remain. In this event, the dismissal is without prejudice if the state courts thereafter deny the claims on their merits, but with prejudice if the state courts reject the claims as untimely or waived.[5]

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[3] *See, e.g.*, *Benton v. Washington*, 106 F.3d 162, 165 (7th Cir. 1996) ("disregard[ing]" the with-prejudice dismissal of a prior petition, because the formally faulty petition should have been dismissed without prejudice).

[4] *See Benton*, 106 F.3d at 164 (in deciding whether dismissal of a "poorly developed" first petition renders a later one "successive," "[q]uestions of characterization [are important]—was the petition really 'returned' on pleading grounds … or was it dismissed as substantively frivolous? That difference is grave under § 2244(b).").

[5] *See, e.g.*, *Banks v. Horn*, 126 F.3d 206, 214 (3d Cir. 1997) (dismissal is without prejudice unless the state courts "hold that Banks' unexhausted claims are procedurally barred"); *Woods v. Kemna*, 13 F.3d 1244, 1245 (8th Cir. 1994); *Meadows v. Legursky*, 904 F.2d 903, 909 (4th Cir. 1990) (en banc); *Fidtler v. Gillis*, 1999 WL 596940 (E.D. Pa. Aug. 9, 1999) (granting state's post-judgment motion to substitute a with-prejudice denial of a habeas petition for a without-prejudice dismissal, based on state decisions revealing that all state remedies had expired); *see also Ford v. Hubbard*, 2002 WL 31001146, at *6 (9th Cir. Sept. 6, 2002) (habeas dismissal "without prejudice" would be treated as "*with prejudice* unless [Ford] establish[ed] that at the time of dismissal he was entitled to equitable tolling"); *Barnes v. Briley*, 43 Fed. Appx. 969, 973-76 (7th Cir. 2002) (the dismissal of a habeas

Thus, as respondent and *amici* concede, some post-judgment motions seeking reconsideration of habeas dismissals that clearly *were* meant to be *with* prejudice do *not* qualify as successive. *See Slack*, 529 U.S. at 479, 487 (although the district court held that its prior dismissal for non-exhaustion was with prejudice to claims not included in the original petition, the Court holds that the presence of new claims in the later petition does *not* make it "successive"); *Calderon*, 523 U.S. at 554 (recall of a court of appeals' mandate to readjudicate claims that had been denied with prejudice on the merits was not "successive" when it was undertaken "on the exclusive basis of [the] first federal habeas petition"); *id.* at 557 (suggesting that a with-prejudice denial of a habeas petition that was procured by "fraud upon the court" is not "successive"); CJLF 9 (there is no "successive application" impediment to 60(b) relief from denial of a habeas petition based on a statutory bar where "the petitioner [did] not meet the exceptions to the statutory [bar] because the state's misconduct prevent[ed] him from doing so").[6]

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petition—timely when filed—as untimely because the filing fee was not paid until after the limitations period expired, renders a later motion for relief on the same claims "successive" if the delay in payment was in "bad faith," but not otherwise; hearing ordered on "bad faith").

[6] *See also Mobley v. Head*, 2002 WL 31066924, at *6, *8 (11th Cir. Sept. 18, 2002) (separate opinion of Tjoflat, J.) (60(b) motions "rais[ing] questions about the integrity of a prior habeas corpus proceeding"—*e.g.*, "that the prior proceeding was rife with fraud" or was based on a judgment that has since "'been reversed'"—do "not [come] under the strictures of … § 2244(b)"); *Workman v. Bell*, 227 F.3d 331, 334-35, 341 (6th Cir. 2000) (en banc) (post-judgment allegations of "fraud upon the court are excepted from the requirements of section 2244"); *Rodriguez v. Mitchell*, 252 F.3d 191, 199, 201 (2d Cir. 2001) (same); *Banks v. United States*, 167 F.3d 1082, 1083 (7th Cir. 1999) (60(b) relief is available if Banks' original petition was filed without his consent, impairing "the integrity of his first habeas proceeding"); *United States v. Washington*, 1999 WL 44092 (10th Cir. Feb. 2, 1999) (ordering 60(b) reconsideration of a § 2255 motion that had been dismissed with prejudice as untimely where the 60(b) motion provided information negating the factual premise of the dismissal); *Deutscher v. Angelone*, 16 F.3d 981, 984 (9th Cir. 1994) (treating a later petition as the "initial" one because the first petition—denied on the merits with prejudice—was filed

Conversely, applications filed after dismissals that *were* expressly "without prejudice" sometimes are impermissibly "successive." *See Slack*, 529 U.S. at 488-89 (subsequent habeas application filed after a "without prejudice" dismissal to exhaust state remedies may be barred as "successive" if the petitioner does not comply with "conditions the court attaches to the dismissal ... to prevent vexatious litigation"); *Dunn v. Singletary*, 168 F.3d 440, 441-42 & n.3 (11th Cir. 1999) (per curiam) ("the section 2244(b) inquiry as to whether a petition is ... successive must focus on the substance of the prior proceedings—on what actually happened"—not on formalities; a later habeas petition thus is barred as "successive," although the prior petition was "dismissed 'without prejudice,'" because the prior petition should have been denied "with prejudice").[7]

2. The proposal to bar all post-judgment applications that cite any "new matter" or "development" which was not "before the court when it entertained the original habeas application" (RB 37; AB 16) is no more workable. Every decision of this

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without Deutscher's consent); *Howard v. Lewis*, 905 F.2d 1318, 1323 (9th Cir. 1990) (remanding to decide whether a prior petition's dismissal "with prejudice" occurred because prison officials frustrated Howard's effort to respond to a motion to dismiss; if so, a later petition with the same claims is not "successive"); *Schornhorst v. Anderson*, 77 F. Supp. 2d 944, 948-49 (S.D. Ind. 1999) (although a first petition was "fully adjudicated and dismissed with prejudice," and it omitted the incompetence-to-be-executed claim raised in the second petition, the new claim is not "successive" because it relies on mental problems arising after the first petition was denied).

[7] *See also Nowaczyk v. Warden*, 299 F.3d 69, 83 (1st Cir. 2002) ("A dismissal without prejudice [may], in practice, result in a dismissal *with* prejudice, as happened here."); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (10th Cir. 2000) ("join[ing other] circuits" in holding that a post-judgment motion "filed after a previous petition has been dismissed without prejudice for failure to exhaust" becomes a "successive" petition if the petitioner let the limitations period expire before returning to federal court); *Felder v. McVicar*, 113 F.3d 696, 697 (7th Cir. 1997) (followed in *Garrett v. United States*, 178 F.3d 940, 941-42 (7th Cir. 1999)) (a habeas petition is "successive," though the prior one was dismissed voluntarily without prejudice, where the prior one was withdrawn because it was "evident that the district court [was] going to dismiss it on the merits").

Court treating subsequent habeas filings as non-"successive" involved some new matter. *See Calderon*, 523 U.S. at 548, 554 (recall of court's mandate was not "successive" although it was based on *post hoc* discovery of "procedural misunderstandings" affecting a vote for en banc consideration); *id.* at 557 (suggesting that a 60(b) motion based on new evidence of "fraud upon the court" is not successive); *Slack*, 529 U.S. at 488 (a second petition is not "successive" although it relies on a new state court decision to show that state remedies have now been exhausted on claims previously dismissed as unexhausted); *Martinez-Villareal*, 523 U.S. at 640, 645 (a state court's issuance of a "warrant for [the petitioner's] execution," ripening a claim of incompetence to be executed that had previously been dismissed as premature, did not make a new petition raising the claim successive; nor does payment of a filing fee with a second petition that was not tendered with the first petition).

Respondent's and its *amici*'s inability to improve upon the general rule of *Pitchess* and *Browder* as elaborated by *Martinez-Villareal* and *Slack* is unsurprising. As every circuit but the Sixth has recognized, the judgment as to when a 60(b) motion should and should not be deemed a successive application for § 2244 purposes does not lend itself to a reductionist, formulaic sorting rule. *See Dunlap v. Litscher*, 301 F.3d 873, 875-76 (7th Cir. 2002) (citing cases). The Court's existing rule is the best that can be done: A 60(b) motion should be treated as coming within § 2244 when it is the functional equivalent of a "second or successive application" for relief, rather than the same application. *See Martinez-Villareal*, 523 U.S. at 643-44.

As we show next, however, two conditions that are at the heart of the present case account for most of the cases in which this Court and the lower courts (and respondent and *amici*) agree that post-judgment motions for relief from the denial of a habeas petition are so thoroughly encompassed by the original petition that they are part of that "same" application and not the functional equivalent of a "second or successive" application.

III. Petitioner's 60(b) Motion Is Not "Successive."

As respondent and its *amici* concede, a 60(b) motion to reconsider a habeas application is part of that application, not "successive," if (1) *the motion merely directs the court's attention to unconsidered matters raising no new issues of fact or law that go beyond the four corners of the original application*; or (2) *the basis for denying the original application is shown to have been transitory* (*e.g.*, a since-rectified failure to exhaust state remedies) or *illusory* (*e.g.*, a denial concocted by fraud or prosecution misconduct). RB 11-13, 37-39; CJLF 9. In the former situation, the motion is the "same" as the original application because it relies wholly on the same facts and claims as the original application. In the latter situation, the motion is the "same" because it *stands in* for the original application upon a showing that that application went awry for reasons that are illusory or have expired, so the application should be treated "as though it had not been filed." *Slack*, 529 U.S. at 488.[8]

Post-judgment proceedings sometimes are deemed non-successive when only *one* of these conditions is present. *See id.* at 487 (the non-exhaustion basis for prior dismissal was transi-

[8] *Slack* is not functionally distinguishable from the present case. *Slack* holds that a petition filed after a prior one was dismissed for non-exhaustion, and after state remedies were exhausted, is not "second or successive." 429 U.S. at 485-86. The situation is the same, and the outcome would be the same, if the district court dismisses based on *two* explicit rulings—(1) that available state remedies were not exhausted, and (2) that a state remedy still appears to be available—and if the petitioner renews the federal application after state courts have negated *both* conclusions by ruling that petitioner (1) previously did everything needed to exhaust then-available state remedies, but (2) now is time-barred from further state review. And Abdur'Rahman's case in turn is no different from the latter situation. The district court denied his prosecutorial misconduct claims based on two premises: (1) that he had not exhausted available state remedies, and (2) that he was now time-barred from further state proceedings. JA 59. Thereafter, TSCR 39 authoritatively negated the first premise by declaring that petitioner *had* previously done everything needed to exhaust then-available state remedies, while preserving the second premise that no state remedies remain. Just as in *Slack*, therefore, petitioner's later motion is not "second or successive" under § 2244.

tory; but the subsequent application presented new claims). The Court needs not go even that far here, however, because petitioner's Rule 60(b) motion meets *both* conditions.

1. Respondent correctly acknowledges that petitioner's 60(b) motion only "reassert[s] … claims for habeas corpus relief that were presented … in his original petition." RB 9. The motion expressly relies solely on "evidence … in the … record" of the original proceeding. JA 169. And the motion's single basis for 60(b) relief is that the district court fundamentally misunderstood the "pre-existing state law" on which petitioner had always relied for the proposition that by presenting his prosecutorial misconduct claims to the Tennessee Court of Criminal Appeals he had exhausted the post-conviction appellate process "'available … under the law of the state.'"[9]

The 60(b) motion's reliance on TSCR 39—which was adopted just before the motion was filed—does not alter this situation. Rule 39 explicitly governs "all appeals from … post-conviction relief matters from and after July 1, 1967." And the Tennessee Supreme Court's Order Establishing Rule 39 explains that it was adopted "in order to clarify" state law in existence since "1967 [when] the General Assembly created the Tennessee Court of Criminal Appeals … to reduce the [Tennessee Supreme Court's] backlog in criminal cases."[10] These clear

[9] *Compare* Pet. Resp. to Mtn. for Summ. J. 45-46 (Oct. 15, 1997; Dkt. # 91) ("'under the law of the State'" of Tennessee, a "claim is exhausted … if it is presented" on "appeal to the Tennessee Court of Criminal Appeals"; "[i]n State post-conviction, petitioner did not have the right to present his claim to the Tennessee Supreme Court," as is required to make a procedure "'available'" for exhaustion purposes under 28 U.S.C. § 2254(c)) *with* JA 163-64 (60(b) relief is warranted because the district court's conclusion that petitioner failed to exhaust offends "pre-existing Tennessee law" under which all "claims [that] were properly presented to the Tennessee Court of Criminal Appeals in Petitioner's state post-conviction appeal … were therefore exhausted" and under which "discretionary appeal to the Tennessee Supreme Court has never been available … to exhaust state remedies").

[10] Order Establishing Rule 39, Pet. Brf. 5a; *see also* 2001 Adv. Comm. Comment to Tenn. R. App. P. 11 (under TSCR 39, "which works no change to" Tennessee law, discretionary supreme court review is not an "available

statements by the Tennessee Supreme Court have the same legal effect as the Pennsylvania Supreme Court's reply to a question this Court certified to it in *Fiore v. White*, 528 U.S. 23 (1999)—whether a recent decision of that court was a "correct interpretation of [a Pennsylvania] statute … 'from the very beginning,'" or "whether it *changed* the interpretation." *Id.* at 29 (emphasis added). The Pennsylvania court's reply, that the recent decision "'merely *clarified*' the statute and was the law … as properly interpreted" since the statute was enacted, *Fiore v. White*, 531 U.S. 225, 228 (2001) (emphasis added), is identical to the language of Rule 39's promulgating order. Both clearly demonstrate that the state high court's pronouncement "was *not new law* [and] presents no issue of retroactivity." *Fiore II*, 531 U.S. at 228 (emphasis added).[11]

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state remed[y]" for "error" in a "decision by the Court of Criminal Appeals"). July 1, 1967, is doubly crucial. On that day, *both* the state's Court of Criminal Appeals *and* its current post-conviction review act came into existence. Tenn. Pub. Acts 1967, ch. 226, 310. From then until now, the only section of the post-conviction statute on "Appeal after judgment" has said that "an appeal may be taken to the court of criminal appeals"; it has never mentioned Tennessee Supreme Court review. *Id.* ch. 310; TCA § 40-30-216.

[11] Rule 39's applicability to "all … post-conviction relief matters from and after July 1, 1967," and the court's explanation that the rule clarifies pre-existing law, distinguish this case from *Wenger v. Frank*, 266 F.3d 218, 225 (3d Cir. 2001) (ruling that Pa. S. Ct. Order 218—providing that, "*effective*" on "*May 9, 2000*," discretionary review is no longer part of the state's standard review process—clearly is a *new* rule (as Wenger conceded) that was not intended (as Wenger claimed) to have "retroactive application"). Since *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), most States have not undertaken to change their procedures in response to *O'Sullivan*'s premise that, "without more," a discretionary review procedure is "part of the ordinary appellate review procedure." *Id.* at 847-48. Two states have continued to enforce pre-existing rules, *see id.* at 847, excluding discretionary review procedures from their "ordinary appellate review" process. *Swoopes v. Sublett*, 196 F.3d 1008, 1009 (9th Cir. 1999) (Arizona); *State v. McKennedy*, 559 S.E.2d 850 (S.C. 2002). Four states have adopted post-*O'Sullivan* rules: Arkansas, like Pennsylvania, made its rule prospective (Ark. S. Ct. R. 1-2(h), effective Feb. 15, 2001); only Missouri, like Tennessee, adopted a rule "stat[ing] existing law." Mo. S. Ct. R. 83.04 (discretionary review "is not part of the standard review process"). Immediately thereafter, the Eighth

2. The ground on which the federal district court refused to hear petitioner's claims of prosecutorial misconduct is illusory because it was based on a fundamental misunderstanding of *pre-existing* Tennessee law. The crux of the district court's ruling against petitioner is that he "failed … to exhaust the remedies available to him in state court" because he only "present[ed] claims to the Tennessee Court of Criminal Appeals on appeal of the denial of his post-conviction petition" and did not "seek discretionary review from … the Tennessee Supreme Court." JA 50, 53. Rule 39 makes clear that this view of Tennessee procedure is completely unsupportable: "[A]fter July 1 1967, … when [a] claim has been presented to the Court of Criminal Appeals …, and relief has been denied, the litigant … ha[s] exhausted *all available state remedies* … for that claim" (emphasis added). And as this Court repeatedly has held, "the [state] court's construction of the State's own law is authoritative." *Ring v. Arizona*, 122 S. Ct. 2428, 2440 (2002) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (a habeas case)).

In a recent opinion distinguishing petitioner's case from a 60(b) motion before the Eleventh Circuit, Judge Tjoflat made precisely this point in explaining why petitioner's motion is not "successive." *Mobley v. Head*, 2002 WL 31066924, at *8 (11th

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Circuit read the Missouri rule as indicating that discretionary high court review had never been available for federal exhaustion purposes under Missouri law. *Randolph v. Kemna*, 276 F.3d 401, 404 (8th Cir. 2002). Because the Eighth Circuit had applied a similar approach before as well as immediately after *O'Sullivan* (*see id.* at 403-04; *Dolny v. Erickson*, 32 F.3d 381 (8th Cir. 1994)), no post-judgment litigation has arisen there. Likewise, petitioner's post-judgment motion is only one of two pending on the issue in Tennessee. Thus, despite *amici*'s wild doomsaying about "massive loophole[s]" (AB 13; *see* RB 25 n.20), there is nothing remotely resembling any "mass" anywhere in sight.

Kentucky is one of the States where discretionary state supreme court review has long been treated by state and federal courts as a part of the state's ordinary review processes. *See Silverburg v. Evitts*, 993 F.2d 124, 126-27 (6th Cir. 1993) (canvassing state and federal decisions). *Silverburg* continues to state the Sixth Circuit's pre- and post-*O'Sullivan* rule on exhaustion of discretionary review with respect to Kentucky.

Cir. Sept. 18, 2002) (separate opinion of Tjoflat, J.). In rare cases, Judge Tjoflat notes, 60(b) motions are outside § 2244 because they are "designed to cure procedural violations in an earlier … habeas corpus proceeding [] that raise questions about that proceeding's integrity." *Id* at *6. Petitioner's is such a case: "Abdur'Rahman was not trying to use Rule 60(b) to assert [new] constitutional violations" and "[t]herefore … was not using rule 60(b), incorrectly, as the practical equivalent of a 'second or successive' habeas corpus petition but, properly, to seek relief" from a district court judgment inconsistent with a "Tennessee Supreme Court procedural rule." *Id.* at *7-*8.

Equally to the point is *Muniz v. United States*, 236 F.3d 122 (2d Cir. 2001) (per curiam)—one of the rare cases during the last 15 years in which a motion to reopen a section 2254 or 2255 application was held not to be "successive" (*see* the following footnote) and one of the extremely rare cases in which reopening was granted. Muniz filed a 2255 application within one year of AEDPA's effective date but more than a year after his conviction had become final. The district court dismissed the application with prejudice as untimely under AEDPA's one-year statute of limitations. Before Muniz's appellate rights expired, the Second Circuit decided two cases construing AEDPA to provide a one-year grace period, which rendered applications like Muniz's timely. *Id.* at 124. After Muniz's application for a certificate of appealability was denied—it did not mention the new Second Circuit cases—and after his out-of-time appeal was dismissed with prejudice, Muniz filed a second 2255 motion raising the same claims. Relying on Muniz's *pro se* status to excuse both his failure to cite the new Second Circuit decisions in his application to appeal and his untimely appeal, and emphasizing the rarity of the situation, the Second Circuit held that Muniz's subsequent 2255 motion "count[ed]" as the same, not a "second or successive," application. *Id.* at 128-29. It did so because the legal premise of the prior judgment was illusory—*i.e.*, because "the law on which that dismissal was predicated is unarguably no longer good

law." *Id.* at 129.[12] So, too, under TSCR 39, the district court's premise for dismissing petitioner's prosecutorial misconduct claims as unexhausted is "unarguably no longer good law."

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[12] Rule 60(b) motions relying on *new* legal developments that reveal *pre-existing* law with which a habeas judgment *unarguably* conflicts are passing rare. But when they arise, they are consistently treated as non-"successive." *See Blackmon v. Money*, 531 U.S. 988 (2000) (mem.), *on remand*, 27 Fed. Appx. 543 (6th Cir. 2001) (denial of 60(b) motion for relief from unappealed, with-prejudice dismissal of habeas petition as untimely is remanded for reconsideration in light of *Artuz v. Bennett*, 531 U.S. 4 (2000), construing AEDPA's statute of limitations in a way that could make Blackmon's dismissed petition timely); *Thomas v. Roe*, 23 Fed. Appx. 847 (9th Cir. 2001) (granting 60(b) relief from unappealed, with-prejudice dismissal of habeas petition after *Artuz* revealed that dismissing the petition as untimely was unarguably in error); *Guyton v. United States*, 23 Fed. Appx. 539, 540 (7th Cir. 2001) (dicta) (Rule 60(b) motion may be used to reopen a with-prejudice dismissal, as untimely, of a 2255 motion that clearly *was* timely under recent cases applying the "prison mailbox rule" to federal prisoners); *In re Davenport*, 147 F.3d 605, 609-11 (7th Cir. 1998) (Posner, J.) (following *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997)) (where, after Davenport's 2255 motion had been denied, this Court interpreted the statute under which he was convicted as not criminalizing his acts, a later habeas petition did not offend AEDPA; Davenport's failure to raise the claim in his 2255 motion when circuit law was "firmly against him" was no bar because of the "fundamental" difference between relying on "a change in the law" (which AEDPA bars), and relying on an interpretation that has always been the law but "was not widely known"); *see also Cornell v. Nix*, 119 F.3d 1329, 1332 (8th Cir. 1997) ("'A post-judgment change in the law having retroactive application may … constitute an extraordinary circumstance warranting vacation of a judgment' [in a] habeas corpus proceeding.").

A thorough Westlaw search has revealed that all but a tiny fraction of the 60(b) motions filed since 1985 were rejected as successive precisely because they relied on new facts or on new law that was not unarguably controlling when the original petition was adjudicated, or because they offered no reason why the grounds for denying the original petition were illusory or transitory. And in most of the cases in which 60(b) motions were deemed *not* successive, the motions were denied because they did not satisfy Rule 60(b). *See, e.g.*, *Mobley*; *Workman*; *Rodriguez*, *supra* note 6 (reaching the merits of 60(b) motions alleging fraud but barring relief because the motions failed on their face to satisfy 60(b)'s narrow "fraud" provision). The cases cited in the preceding paragraph and *Muniz* are thus exceptional in the extreme.

IV. Respondent's and *Amici*'s Effort to Avoid the Effect of TSCR 39 Offends Every Rational Concept of Comity.

Recognizing that TSCR 39's statement of Tennessee law since 1967 brings petitioner's 60(b) motion within the four corners of his original habeas petition—and that the district court denied that petition solely through a contrary understanding of Tennessee law—respondent and *amici* launch an all-out assault on Rule 39. They claim that Rule 39 is "irrelevant" or, worse, an illegitimate effort to "alter . . . objective historical fact" and "change the requirements of federal law as construed by this Court in *O'Sullivan* [*v. Boerckel*, 526 U.S. 838 (1999)]." RB 49; AB 20, 24. *O'Sullivan* itself repels all of these attacks.

As *O'Sullivan*'s careful review of exhaustion doctrine confirms, the Court has "never interpreted" the words of § 2254(c)—"exhaust[ion of] the remedies *available* in the ... State"—to "requir[e] a state prisoner to invoke *any possible* avenue of state court review." 526 U.S. at 844. "Section 2254(c) requires only that state prisoners give state courts a *fair* opportunity to act on their claims ... by invoking one complete round" of "the standard review process." *Id.* at 844-45. So, when the Tennessee Supreme Court explains in Rule 39 that its discretionary review of post-conviction rulings has not been "available" under Tennessee law since 1967, it is not trying to "alter" the "objective" fact that leave to appeal to the supreme court was a "possible avenue of ... review." It is saying simply that supreme court review has not been "available" in Tennessee since 1967 *as the word "available" in § 2254(c) has been interpreted by this Court—i.e.*, that discretionary review has never been part of the "standard" or "ordinary appellate review procedure in the State" that needs to be invoked to "give state courts a fair opportunity to act on [a prisoner's] claims." *Id.* at 844, 847.

It would be the most perverse distortion of federalism for a federal court to ignore as "irrelevant" or *ultra vires* this kind of authoritative description by a state's highest state court of what procedures are and are not "available" under state law in the

sense of being "standard," "ordinary" and necessary to a "fair opportunity for [*state court*] review." For the very concept of comity dictates that "the exhaustion doctrine ... turns on an inquiry into what procedures are 'available' under state law," and thus "on [an] interpretation of [the state] Rule" establishing the state's discretionary review process. *O'Sullivan*, 526 U.S. at 847-48. "[T]here is nothing in the exhaustion doctrine requiring federal courts to ignore a state ... rule providing that a given procedure is not available."[13] *Id.*

To add insult to injury by suggesting that Rule 39's description of state law since 1967 is illegitimate because the Tennessee Supreme Court "lacks any interest" in the application of state law to cases no longer before it (RB 49; AB 27 n.7) is to ignore the state high court's most fundamental obligation and interest: to say accurately and conscientiously what the law of the state is. *See, e.g.*, *Fiore*, 531 U.S. at 228-29 (treating as decisive a state high court's advisory answer to a certified question—that its interpretation of a state statute in a prior case had "'merely clarified'" state law and did not "change ... the law"); *Stewart v. Smith*, 122 S. Ct. 2578, 2581 (2002) (per curiam) (treating as decisive a state high court's advisory answer to a certified question—that applying an exception to a state default rule did not require any consideration of federal law).

Section 2254(c) is a "rule of comity." It aims to "*reduce*[] friction between the state and federal court systems" and to "*avoid* ... 'unseem[liness]'" when federal courts usurp the state courts' responsibility to interpret and apply law "in the first instance." *O'Sullivan*, 526 U.S. at 845 (emphasis added). Given "'the respect that federal courts owe the States and the States' procedural rules'" (*Coleman v. Thompson*, 501 U.S. 722, 726 (1991)), respondent's reliance on the exhaustion doctrine as a reason to *disregard* the plain terms of a state procedural rule, and to *distrust* the Tennessee high court's clarification of the

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[13] *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

longstanding statutory division of labor between it and the state's court of criminal appeals, is bizarre.

This effort to remake federalism in a result-oriented guise subordinates respect for state courts, and even the basic right of sovereign states to organize their judicial systems in ways that serve the state's chosen ends, to the desire of state prosecutors to insulate convictions and sentences from federal judicial scrutiny. If this is what Congress had intended, it would have simply repealed the federal habeas jurisdiction in AEDPA. But it did not. It continued the balancing the Court so aptly described in *Lonchar v. Thomas*, 517 U.S. 314, 323-27 (1996), keeping the federal courts open for a single round of review of every constitutional claim that has first been presented to the state courts in the way that *the state courts* decree meets the state's interests in adjudicating federal claims. *See Coleman*, 501 U.S. at 749 (a "vital purpose" of the "State's ... procedural rules" is to "channel ... the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently" (internal quotation marks omitted)).

Rule 39—the basis for petitioner's 60(b) motion—makes clear as a matter of pre-existing state law that he fully exhausted his claims in the state's regular review process. Because the contention that he did so does not go beyond the four corners of his original habeas action, and because the district court judgment rejecting that contention was premised on an "unarguable" misunderstanding of the pre-existing state law clarified by Rule 39 (*Muniz*, 236 F.3d at 129), petitioner's 60(b) motion to correct the misunderstanding and afford him a single round of review of his constitutional claims, is within "his first application rather than a successive one." *Calderon*, 523 U.S. at 554.[14]

[14] The applicability and effect of Rule 39 in petitioner's case are unarguable for reasons that distinguish it from almost every other new interpretation of law on which a 60(b) motion could be based: Rule 39 is set out in a black-letter rule of court that is expressly designed to "clarify" the law governing *all* relevant cases; it interprets state *statutes*, not malleable case law; and its applicability turns on a single, objective date (July 1, 1967). In the typical case in which a 60(b) motion relies on a new interpretation of law (*see* cases in RB 39 & n.32), the interpretation is in a *judicial opinion* designed to decide only *a single litigant's case*, by applying other *decisional law*. Rarely, if ever, will that kind of interpretation make *unarguably clear* (1) that the new decision says what the law "always" was, without "chang[ing] the interpretation" in effect when the original habeas petition was decided (*Fiore*, 528 U.S. at 29); and (2) that the decision dictates an outcome different from the one the district court reached. *Cf. id.* (even when the new state court decision was in a co-defendant's case with identical facts, this Court still could not be certain that the decision stated the law in effect when Fiore's case was decided).

V. Any Proper Exercise of Rule 60(b) Discretion Would Require Relief from the District Court's Judgment.

The fact that a 60(b) motion cannot be viewed as the functional equivalent of a successive application does not mean that the motion will be *granted*. To be granted, the 60(b) motion *also* must satisfy the exacting criteria of Rule 60(b) itself. And almost any motion to reopen a judgment that does *not* raise a new issue of fact or law going beyond the four corners of the original habeas action likewise will *not* present grounds that meet the strict 60(b) criteria for reopening a judgment. QED.

But this case is the rare case in which a 60(b) motion raising no issue outside the four corners of the original habeas application does meet 60(b)'s criteria, and indeed compels an exercise of discretion to reopen the judgment.[15] It does so for the following constellation of extraordinary reasons: (1) The judgment that petitioner seeks to reopen is based entirely on a procedural impediment that prevented the district court from addressing the constitutional merits of substantial claims of egregious prosecutorial misconduct.[16] *Cf. Semtek Int'l Inc. v. Lock-*

[15] The district court never exercised Rule 60(b) discretion, thinking it had none in a habeas case. A remand to the district court to exercise discretion "in the first instance" is not required, however, because the proper outcome is clear. *Cf. Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 496 (1942).

[16] Respondent does not dispute the seriousness of petitioner's prosecutorial misconduct claims. *Amici* question the effect of the misconduct—they don't dispute that it occurred—but in doing so they highlight how seriously the violations corrupted the penalty-phase verdict. The *reason* the jury was left (as they say) with "no serious question" that petitioner, not codefen-

heed Martin Corp., 531 U.S. 497, 501-02 (2001) (only a judgment that "'passes directly on the substance of [a particular] claim' … triggers the doctrine of res judicata" and its full range of finality interests); *Slack*, 529 U.S. at 483 (the "writ of habeas corpus plays a vital role in protecting constitutional rights," and "Congress [has] expressed no intention to allow [district] court procedural error"— where "the District Court [erroneously] relies on procedural grounds to dismiss the petition"—"to bar vindication of substantial constitutional rights"). (2) The sole premise of that impediment to reaching the merits was an unarguable misunderstanding of clearly governing state law. *See* pp. 9-13 & n.12, *supra*. (3) This is the rarest of cases in which a 60(b) motion filed after the district court and court of appeals ruled was the first point at which the petitioner could demonstrate this plain fact about pre-existing and clearly controlling state law. Only then did the Tennessee Supreme Court adopt

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dant Miller, stabbed the victim (AB 2-3) was the prosecutor's presentation of Miller's unchallenged testimony to that effect. But presenting that testimony was an egregious misrepresentation, because the prosecutor knew that Miller was lying when he testified that: (1) petitioner wore the "black gangster coat" the whole time *and* stabbed the victim [whereas, according to the prosecutor's file memorandum, "if the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred" because the coat had no blood on it, Pet. Brf. 9a]; (2) no blood splatter accompanied the stabbing [whereas the prosecutor and chief detective knew that multiple stabs to the heart necessarily "would cause [blood] to splatter"; and suppressed police reports showing that a huge amount of splatter did occur); and (3) the "only" deal Miller received in return for testifying was immunity from the death penalty, leaving him exposed to a *90-year-minimum* term [whereas the prosecutor had *also* agreed to adjust Miller's charges so as to make him eligible for parole in only *7-1/2 years*.] Likewise, any credence the jury gave petitioner's bizarre sentencing-phase testimony—that he blacked out and didn't remember what happened but would "submit to" Miller's testimony "about what happened"—was a function of the prosecutor's having hidden from the defense, and having outright lied to the mental health experts and the court about, a myriad of evidence of petitioner's psychosis, blackouts under stress, obsessive head-banging after arrest, "long history of [psychiatric] institutionalization," and other information showing (as the prosecutor admitted in his memorandum) that petitioner is "plain whacko." Pet. Brf. 10-23.

Rule 39.[17] (4) Petitioner's 60(b) motion was filed and adjudicated *before* the court of appeals issued its mandate reversing the district court's grant of penalty-phase relief—*i.e.*, before the "state's interests in finality [became] compelling" and while the federal courts were under a duty to conform their rulings to existing state law.[18] (5) This is the unique case in which 60(b) re-

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[17] No Tennessee caselaw or rule predating Rule 39 speaks remotely to whether petitions for discretionary supreme court review were part of the state's regular post-conviction process. This is because, before *O'Sullivan*, the assumption in the state was that the discretionary nature of such petitions made them unnecessary for exhaustion. Thus, as of the moment the Court announced *O'Sullivan* and rejected that blanket assumption—the very moment petitioner was preparing his Sixth Circuit brief—he was bound by *O'Sullivan*'s ruling that, absent state law "mak[ing] it plain that [the state] does not wish to require [discretionary] applications before its petitioners may seek federal habeas relief," federal courts had to treat state discretionary review as part of the state's ordinary appeal process. *O'Sullivan*, 526 U.S. at 849 (Souter, J., concurring). When petitioner presented his Sixth Circuit appeal, therefore, he had no even oblique basis for disputing *O'Sullivan*'s application to his case; and he committed no default when he did not make a baseless claim. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 n.5 (1992) (failure to present an argument may be excused if "the factual or legal basis for [it] was not reasonably available to counsel"); *Bousley v. United States*, 523 U.S. 614, 622 (1998). The first time the content of pre-existing state law became "plain," revealing both the district court's misunderstanding of it and that *O'Sullivan*'s default rule did not cure the problem, was when the Tennessee Supreme Court adopted Rule 39 *sua sponte*. Petitioner's *certiorari* petition was then pending in this Court, and, upon its denial, he promptly moved for post-judgment relief, citing Rule 39. JA 158-63. In any event, respondent's argument (RB 37 n.29) that the 60(b) motion "abused the writ" by relying on claims petitioner had not raised on appeal comes too late: respondent never made the argument below or in its Brief in Opposition. *See Lee v. Kemna*, 122 S. Ct. 877, 885 n.8 (2002).

[18] *See Calderon*, 523 U.S. at 556. As long as the mandate is stayed, the point of compelling finality has not arrived; the duty remains to conform the judgment to state law; and neither the entry or receipt of an order denying *certiorari*, nor Fed. R. App. P. 41(d), alters that duty. *See, e.g.*, *Calderon*, 523 U.S. at 557 (case would have been different if "the mandate [had been] stayed" during the "disposition of a suggestion for rehearing"); *Calderon v. United States Dist. Ct.*, 128 F.3d 1283, 1286 n.2 (9th Cir. 1997); *United States v. Rivera*, 844 F.2d 916, 919-21 (2d Cir. 1988); Adv. Comm. Note to Fed. R. App. P. 41 ("A court of appeals' judgment … is not final" and the

lief does not subordinate the "State's interest in … its own legal processes" and "procedural rules" to a habeas petitioner's "quite strong" "interest in … federal habeas review of a first petition," but, instead, is *necessary* to effectuate *both* interests. *Cf. Lonchar*, 517 U.S. at 322, 330; *Coleman*, 501 U.S. at 726.[19]

CONCLUSION

In the exceptional circumstances of this case, Rule 60(b) relief is appropriate and offends no statutory proscription or policy concern against second or successive habeas petitions. The Court should vacate the decision below and remand to the district court with directions to grant petitioner's 60(b) motion so that his properly presented federal claims of prosecutorial misconduct can be heard once on the merits by a federal court.

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parties' rights are not "fixed" "until issuance of the mandate"); Pet. Brf. 38-39 (citing cases). The duty to conform federal judgments to state law is so strong that it extends *beyond* issuance of the appellate mandate to the point when the district court *acts* on it. *See* 18B Wright & Miller, *Federal Practice & Procedure* §§ 4478, 4478.3 (3d ed. 2002) (the "most obvious" circumstance compelling a federal court's deviation from the law of the case doctrine and from a higher court's mandate, is action "by … a state court developing state law that controls the decision"). This rule applies even when state "law has been changed." *Id.* § 4478. It has particular force when a state court clarifies what state law has "always meant." *Fiore*, 528 U.S. at 25. Because the only judgment the district court has issued *granted* petitioner the same penalty-phase relief he now seeks (JA 45)—successive stays having kept the district court from acting on the Sixth Circuit's mandate reversing that judgment—respondent does not have the "reliance" interest in the denial of relief that the Court found important in *Calderon*, 523 U.S. at 552.

[19] This also is one of the few cases left in the federal courts in which AEDPA's added finality concerns do not apply to the district court's 60(b) proceedings. *Compare Lindh v. Murphy*, 521 U.S. 320, 336 (1997), *with Slack*, 529 U.S. at 478. Respondent argues that "because petitioner's Rule 60(b) motion constitutes a new habeas application which was filed [after AEDPA]," AEDPA determines whether it "was 'second or successive under the Act." RB 10 n.6. Of course this has it backwards. If the 60(b) motion was appropriate before AEDPA, AEDPA does not apply to determine its status as a "new habeas application . . . under the Act." *See Lindh*, *supra*, at 336.

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IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,
Petitioner,

v.

Ricky Bell, Warden,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER ABU-ALI ABDUR'RAHMAN

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CAPITAL CASE

SUPPLEMENTAL QUESTIONS PRESENTED

1. Did the Sixth Circuit have jurisdiction to review the district court's order, dated November 27, 2001, transferring petitioner's Rule 60(b) Motion to the Sixth Circuit pursuant to 28 U.S.C. § 1631?

2. Did this Court have jurisdiction to review the Sixth Circuit's order, dated February 11, 2002, denying leave to file a second habeas corpus petition?

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STATUTES INVOLVED

This brief involves 28 U.S.C. §§ 1254(1), 1291, 1631, 2253, and 2244(b)(3), which are set forth in Appendix A.

STATEMENT OF RELEVANT PROCEEDINGS

The federal district court in this habeas corpus proceeding held that it could not reach the merits of petitioner's Due Process claims of egregious prosecutorial misconduct because petitioner had failed to ask the Tennessee Supreme Court for leave to "appeal by permission" from an adverse decision on those claims by the Tennessee Court of Criminal Appeals. Although the granting of permission to appeal was discretionary with Tennessee's highest court, the federal district judge concluded that a request for such permission was a state remedy that had to be exhausted in order to preserve petitioner's Due Process contentions for federal habeas review.

As petitioner was preparing his brief on the habeas appeal (filed Aug. 4, 1999), this Court decided *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). *O'Sullivan* held that unless state law clearly says otherwise, discretionary review is part of the state's "ordinary" appellate process and must be exhausted. *Id.* at 847.

The Sixth Circuit denied all habeas relief on September 13, 2000, and stayed its mandate pending certiorari proceedings. JA 21, 134. During those proceedings, the Tennessee Supreme Court issued Tenn. S. Ct. R. 39, "clarify[ing]" that discretionary review in that court had not been part of the state's "routine[]" appellate process at any time since July 1, 1967, when the Tennessee Court of Criminal Appeals was created. JA 163.

This Court denied certiorari on October 9, 2001. Later that day, petitioner asked the district court for an expedited status conference, which was held the next day. At the conference, petitioner orally moved for Rule 60(b) relief from the court's judgment, contending that the judgment had been premised on a misunderstanding of state law that Rule 39 dispelled. In argument, the court was informed of the established practice allowing it to signify its disposition to grant the Rule 60(b)

motion, if indeed it was so inclined, and thereby obtain a remand of the pending appeal for that purpose. The court asked for briefing on the question whether petitioner's 60(b) motion was "successive." 10/10/01 Tr. 2-4, 12-15, 25.[1]

That same day, October 10, 2001, petitioner moved the Sixth Circuit to withhold its mandate in the pending appeal (Nos. 98-6568/9) and to "remand to the district court" to determine whether, as he claimed, Rule 39 made "clear that [its non-exhaustion] conclusion was erroneous." JA 152, 154-56 & n.12 (noting Rule 60(b) proceedings in district court). The court of appeals ordered the state to respond and withheld its mandate until it denied the motion on February 11, 2002. JA 23, 27.

On November 27, 2001, the district court decided under *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996), that a "60(b) Motion must be construed as . . . a successive petition." Because that decision triggered 28 U.S.C. § 2244(b)(3)(A), which deprives district courts of first-instance jurisdiction over "a second or successive application," the court transferred the case to the court of appeals. JA 42 (citing 28 U.S.C. § 1631).

The court of appeals docketed the transferred case as "an application for permission to file a successive petition," assigning it No. 01-6487. Petitioner immediately informed the court of appeals that: *(1)* he "*has not* filed an application for a . . . successive petition" (original emphasis) and "never intended" to file one or have his 60(b) motion "converted into" one; *(2)* he therefore doubted whether the appellate court had jurisdiction under § 2244(b)(3)(A), which requires an "applicant [to] move . . . for an order authorizing" a "second or successive application"; *(3)* he therefore had filed an appeal—docketed as No. 01-6504—challenging the district court's decision that the 60(b) motion was "successive," but "*not* appealing" the lower court's further order transferring a "successive petition"—in which he had no interest; and *(4)* the Rule 39 issue could also "appropriately be addressed by

[1] Petitioner filed his written 60(b) motion and brief on Nov. 2, 2001.

granting Petitioner's motion in Nos. 98-6568/9 to withhold the mandate and to remand the case." 12/1/01 Letter to Sixth Circuit Clerk 2-3;12/6/01 Mot. to Hold [No. 01-6487] in Abeyance 1-2; 12/5/01 Applic. for Certif. of Appealability 13; 12/20/01 Reply to Resp. 1-3.

In a January 18, 2002 order denying petitioner's request for a certificate of appealability in the 60(b) appeal (No. 01-6504), the Sixth Circuit panel affirmed the district court's decision that "a Rule 60(b) motion is the equivalent of a successive petition." That ruling made it "proper[]" to go on in the "transferred" case to consider "whether the Rule 60(b) motion satisfied the gateway criteria of § 2244(b)." JA 36.

In a final order in all three cases on February 11, 2002,[2] the court denied the motion to remand and issued its mandate in the original appeal (Nos. 98-6568/9); dismissed the 60(b) appeal (01-6504) on the basis of its January 18 ruling that the 60(b) motion was "successive," triggering the court's authority under § 2244(b)(3)(A); and denied leave (not requested by petitioner) to file a successive application (01-6487). JA 39.

On March 19, 2002, petitioner asked this Court for both a writ of certiorari (01-9094) and an original writ of habeas corpus (01-9095) to review the court of appeals' January 18 and February 11 decisions affirming the district court's ruling that his 60(b) motion was "successive." Petitioner sought review of this ruling in the 60(b) appeal (No. 01-6504) and also in the transferred case (No. 01-6487) to the extent that the latter was the locus of the same ruling. Petitioner emphasized that he "*does not seek review of the Sixth Circuit's gatekeeping ruling denying him 'authorization' to file a 'second or successive' application.*" He also asked the Court to review the denial of his motion to remand the original appeal (Nos. 98-6568/9). Cert. Pet. vi, 1 & n.1, 9-12 & n.5; Cert. Rep. 2-3; Habeas Pet. i.

The Court granted petitioner's application for a stay of execution and denied his original habeas petition on April 8,

[2] The Joint Appendix (at 38) contains a typographical error: it omits docket no. 01-6487 from the matters in which the order was entered.

2002. On April 22, 2002, the Court granted certiorari on two issues: Did the lower courts correctly rule that the 60(b) motion was per se successive? Did the court of appeals correctly deny the motion to remand the Rule 39 issue to the district court?

I. THE SIXTH CIRCUIT HAD JURISDICTION.

A. The question of the Sixth Circuit's jurisdiction to review the district court's order of November 27 is like the jurisdictional question decided in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). There the Court recognized that jurisdiction turned upon a proper categorization of the nature of the proceeding, and that the categorization question coincided with the main issue in dispute between the parties on the merits. Here petitioner's submission on the merits is that his Rule 60(b) motion *was* a permissible Rule 60(b) motion, not a "second or successive habeas corpus application" requiring authorization by the court of appeals before it could be filed in the district court under 28 U.S.C. § 2244(b). Respondent's submission is that the motion was a second habeas application. The district court accepted respondent's categorization and therefore rejected the motion, and transferred the case to the court of appeals under 28 U.S.C. § 1631. If this ruling was wrong, the court of appeals had jurisdiction to review it under 28 U.S.C. §§ 1291 and 2253.

Rulings finally disposing of motions made under Fed. R. Civ. P. 60(b) are "final decisions" appealable under § 1291. *See* Moore's Federal Practice 3d – Civil §60.68[1]. In habeas cases they are "final order[s]" appealable under § 2253. *See, e.g., Dunlap v. Litscher*, 301 F.3d 873, 875 (7th Cir. 2002) (court of appeals "consolidated for decision three appeals from denial or dismissal of motions under Rule 60(b) . . . that present similar questions about the circumstances in which prisoners subject to . . . [AEDPA] may file motions under Rule 60(b)"). Specifically, a district court's holding that a Rule 60(b) motion or other filing constitutes a successor habeas petition is an appealable order. *See Slack v. McDaniel*, 529 U.S. 473 (2000) (determination by district court that habeas claims were

"second or successive" was reviewed on appeal by the Ninth Circuit, then by this Court on certiorari); *Garrett v. United States*, 178 F.3d 940 (7th Cir. 1999) (reversing the district court's finding that a § 2255 motion was successive); *Graham v. Johnson*, 168 F.3d 762, 774-75 (5th Cir. 1999) (holding that dismissal for failure to seek court of appeals' authorization to file successor petition is an appealable final order when a habeas petitioner challenges the applicability of § 2244(b) to the petition); *McQueen*, 99 F.3d at 1334-35 (reviewing and affirming the denial of a Rule 60(b) motion filed during the pendency of appeal, when the district court found that the motion constituted a successor petition and an abuse of the writ).

Although (as in *McQueen*) petitioner's original habeas appeal was pending when he filed his 60(b) motion, that did not deprive the district court of jurisdiction to consider the motion. This Court has recognized that "the pendency of an appeal does not affect the district court's power to grant Rule 60 relief." *Stone v. INS*, 514 U.S. 386, 401 (1995).[3]

> The modern view is that a pending appeal does not preclude a district court from entertaining a Rule 60(b) motion. . . . [A] litigant may file a Rule 60(b) motion in the district court despite a pending appeal; the district court may entertain the motion; it may deny the motion on the merits; and if the district court is inclined to grant the motion, the district court or the movant may inform the court of appeals. The appellate court may then remand the matter to the district court for the purpose of granting the motion.

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[3] The Court has similarly held that if a motion for a new trial is filed under Federal Criminal Rule 33 while the direct appeal is pending, the district court has "jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case." *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).

Moore's Federal Practice 3d – Civil §60.67[2][b].[4] Under this now-standard procedure (called a "motion for a *Hirsch* remand" in Sixth Circuit parlance, referring to *First National Bank of Salem v. Hirsch*, 535 F.2d 343 (6th Cir. 1976)), a district court has jurisdiction to consider and reject a Rule 60(b) motion without any sort of leave or remand from the court of appeals despite the pendency of an appeal.[5] And when it does, its "order is appealable as a separate final order, and if the original appeal is still pending, it would seem that the court of appeals can consolidate the proceedings." *Stone*, 514 U.S. at 401.

Equally clearly, the fact that the district court's decision barring petitioner's Rule 60(b) motion as a successor habeas petition within § 2244(b)(3)(A) took the form of an order transferring the motion to the court of appeals made it no less a "final order" appealable under 28 U.S.C. § 2253. Because petitioner never did or could assert any claim that he was eligible for authorization to file a successor petition, the district court's ruling dispatching him to the court of appeals for such authorization was a final order in the classic definition of that term: it "terminate[d] the litigation on the merits of the case, and . . . [left] nothing to be done but to enforce by execution what ha[d] been determined." *Express Companies' Cases*, 108

[4] Only the Ninth Circuit uses a different procedure. This is described and criticized in Moore's Federal Practice 3d – Civil §60.67[2][c].

[5] *See id.* nn.4, 5 (collecting cases). Although the Sixth Circuit gives its district judges discretion to decline to consider a motion for a *Hirsch* remand (see *SEC v. Johnston*, 143 F.3d 260 (6th Cir. 1998)), it reviews district court decisions that do consider such motions (*see, e.g.*, *Good v. Ohio Edison Co.*, 149 F.3d 413, 417 (6th Cir. 1998); *Begala v. PNC Bank*, 214 F.3d 776 (6th Cir. 2000)), treating "[a] denial of a *Hirsch* remand . . . [motion as] essentially a denial of a motion under Fed. R. Civ. P. 60(b)" (*Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001)). Notably, the very case relied upon by the district court and the Sixth Circuit as the basis for characterizing petitioner's 60(b) motion as a successor habeas application, *McQueen v. Scroggy*, implicitly recognized the jurisdiction of the district court to consider and deny a Rule 60(b) motion despite the pendency of an appeal, and of the court of appeals to hear an appeal from that decision.

U.S. 24, 28 (1883). While transfer orders that merely shift the venue in which a party may obtain the relief he seeks are generally not appealable, transfer orders that effectively bar a party from receiving relief in any forum are subject to immediate appeal. *Compare Goble v. Marsh*, 684 F.2d 12, 14 (D.C. Cir. 1982) (transfer order is appealable when rights may be irreparably lost in the absence of immediate review) *with Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 546 (D.C. Cir. 1992) (transfer orders under 28 U.S.C. § 1631 are properly viewed as nonappealable interlocutory orders when "the very purpose of the transfer . . . is to allow the case to continue, rather than terminating it"). Here, the transfer order did not simply change the forum for adjudication of petitioner's claims; it completely foreclosed any consideration of those claims. Thus, the order was final for purposes of the pertinent appeal statutes, §§ 1291 and 2253.

B. In addition to the Sixth Circuit's jurisdiction to review the district court's November 27, 2001 order under 28 U.S.C. §§ 1291 and 2253, the circuit court also plainly had two other sources of jurisdiction to decide the issues on which this Court has granted *certiorari*:

1. In *In re Sims*, 111 F.3d 45 (6th Cir. 1997), the Sixth Circuit approved a practice under which a district court, when presented with a post-AEDPA filing that the district court deems to be a second or successive collateral-attack application which has not been authorized by the court of appeals pursuant to 28 U.S.C. § 2244(b)(3), may transfer the filing to the court of appeals under 28 U.S.C. § 1631, so that the court of appeals can consider whether to grant authorization. The *Sims* procedure, like similar practices adopted in other circuits,[6] is designed to

[6] *See, e.g.*, *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002): "[W]e encourage district courts, in dealing with purported Rule 60(b) motions following the dismissal of habeas petitions, to employ a procedure whereby the district court files the purported Rule 60(b) motion and then conducts a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under either 28 U.S.C. § 2255 or § 2254. If the district court determines the Rule 60(b)

provide a consistent, efficient method of routing to the courts of appeals what appear to district judges to be successor post-conviction pleadings that require "gatekeeper" screening. But, of course, the district judges may sometimes be wrong in regarding a particular pleading as "second or successive"; and, if they are, the court of appeals is obliged to so hold and refuse to accept the transfer. *Graham v. Costello*, 299 F.3d 129, 132 (2d Cir. 2002) (following transfer of a habeas petition to the court of appeals, the court explains that "[b]efore addressing whether Graham's present habeas petition warrants our authorization, we must first be certain that authorization is required because his current petition is a 'second or successive' application under 28 U.S.C. § 2244"); *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997) (when an inmate was compelled to resort to the court of appeals for permission to file a habeas petition as result of the district court's erroneous interpretation of § 2244, the court finds that § 2244's gatekeeping provisions do not apply and that a motion for authorization is unnecessary; it thus remands to district court for consideration of the merits of petitioner's claim).[7] This is simply an instance of the axiomatic proposition that "[a] federal court always has jurisdiction to decide whether it has

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motion is actually a second or successive habeas petition, the district court should dismiss it for failure to obtain authorization from the Court of Appeals or, in its discretion, may transfer the purported Rule 60(b) motion to the Court of Appeals. Depending on which course of action the district court chooses, the petitioner may either appeal the dismissal of the purported Rule 60(b) motion or, if the district court has elected to transfer the purported 60(b) motion to the Court of Appeals, await the action of the Court of Appeals."

[7] *See also, e.g., Haro-Arteaga v. United States*, 199 F.3d 1195 (10th Cir. 1999) (after receiving transfer from district court, court of appeals rules that district court erred in finding that it lacked jurisdiction to consider a § 2255 motion and remands for merits review); *Raineri v. United States*, 233 F.3d 96 (1st Cir. 2000) (court of appeals, following transfer of a § 2255 case to it, holds that district court erred in concluding that the § 2255 motion was governed by successive-petition provisions; it vacates the transfer order, reverses the order of dismissal, and remands the case to the district court).

jurisdiction and, if it decides that it does not, to take appropriate action." Hart & Wechsler's The Federal Courts and the Federal System 1580-81 (4th ed. 1996). In the *Martinez-Villareal* case, *supra*, this Court upheld its own jurisdiction on the premise that the Ninth Circuit court of appeals had jurisdiction to decide precisely this threshold question *whether* a post-conviction filing was or was not "second or successive" so as to need gatekeeper authorization under § 2244(b)(3)(A). 523 U.S. at 641-42. So, in the present case, the Sixth Circuit—when it received petitioner's case transferred from the district court and was confronted with petitioner's objection that the district court had incorrectly held his 60(b) motion subject to § 2244(b)—had the jurisdiction and the obligation to decide whether the district judge or petitioner was right.[8]

2. Petitioner not only filed a 60(b) motion in the district court but also filed a motion in the court of appeals—while his original appeal was still pending in that court following this Court's denial of *certiorari*—asking the court of appeals to withhold its mandate and remand the case to the district court for consideration of the issues presented by the 60(b) motion. Uncontestably, the court of appeals had jurisdiction over the motion filed with it. *See, e.g., Bartone v. United States*, 375 U.S. 52 (1963) (per curiam). And its consideration of the merits of the request for a remand was constrained by AEDPA only if what petitioner was seeking was tantamount to a second or successive petition within § 2244(b), *see Calderon v. Thompson*, 523 U.S. 538 (1998)—the nub of the pair of questions on which this Court has granted *certiorari*.

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[8] As the court of appeals itself rightly recognized in its January 18, 2002 order (JA 36), it was obliged to determine *de novo* whether the transferred motion was, in the words of Section 2244(b)(3)(A), a "second or successive application" before it could take *jurisdiction* of the transferred action. Had it ruled that the action was not second or successive, it would have had either to grant the petitioner's pending motion to remand and send the action back to the district court, *see supra* at 7 & n.6 (collecting cases), or to dismiss and invite the petitioner to refile in the district court, *see, e.g., Banks v. United States*, 167 F.3d 1082, 1083 (7th Cir. 1999).

II. THIS COURT HAS JURISDICTION.

Because, as we saw, the Sixth Circuit had jurisdiction to determine whether petitioner's motions to the district court and to it were "second or successive habeas corpus application[s]" within the meaning of 28 U.S.C. § 2244(b), petitioner's case presenting those questions was "in" the court of appeals for purposes of this Court's jurisdiction under § 1254.

To be sure, Congress has denied this Court jurisdiction to review a court of appeals' "grant or denial of an authorization . . . to file a second or successive application" for habeas corpus. 28 U.S.C. § 2244(b)(3)(E). But petitioner sought no such authorization from the court of appeals, and he is not asking this Court to review any question having to do with whether, *if his Rule 60(b) motion in the district court and his remand motion in the court of appeals were "second or successive habeas corpus application[s],"* they would qualify for authorization under the criteria of 28 U.S.C. § 2244(b). To the contrary, petitioner seeks this Court's review only of the question *whether* his motions *are* "second or successive habeas corpus application[s]." The Court's jurisdiction to decide that anterior question has been settled by *Slack v. McDaniel* (which was "in" the court of appeals on appeal from a district court order dismissing a habeas corpus petition on the theory—held erroneous by this Court—that it was a successor petition) and by *Stewart v. Martinez-Villareal* (which was "in" the court of appeals by virtue of the court of appeals' consideration whether to transfer back to the district court a petition routed to it on a similar theory—similarly held erroneous by this Court).

CONCLUSION

The court of appeals had jurisdiction and this Court has jurisdiction to determine the issues on which *certiorari* was granted.

Respectfully submitted,

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October 31, 2002

APPENDIX A

Relevant Sections of the United States Code:

28 U.S.C. § 1254(1) (2002)
§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1291 (2002)
§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

28 U.S.C. § 1631 (2002)
§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal

could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 2244(b)(3) (2002)
§ 2244. Finality of determination

* * * *

(b) (3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 USCS § 2253 (2002)
§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in

which the proceeding is held.
(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

No. 01-9094

In the
SUPREME COURT of the UNITED STATES

ABU-ALI ABDUR' RAHMAN,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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CAPITAL CASE
QUESTIONS PRESENTED

I.

Whether the Sixth Circuit had jurisdiction to review the district court's order transferring petitioner's Rule 60(b) Motion to the Sixth Circuit pursuant to 28 U.S.C. § 1631.

II.

Whether the Supreme Court of the United States has jurisdiction to review the order of the Sixth Circuit denying leave to file a second habeas corpus petition under 28 U.S.C. § 2244(b)(3).

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II. THIS COURT DOES NOT HAVE CERTIORARI JURISDICTION TO REVIEW THE SIXTH CIRCUIT'S ORDER DENYING PETITIONER LEAVE TO FILE A SECOND HABEAS CORPUS PETITION. 6

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ARGUMENT

I. THE SIXTH CIRCUIT DID NOT HAVE APPELLATE JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER TRANSFERRING PETITIONER'S MOTION TO THE SIXTH CIRCUIT PURSUANT TO 28 U.S.C. § 1631.

On November 27, 2001, the district court determined that petitioner's Rule 60(b) motion constituted a second or successive application under 28 U.S.C. § 2244(b). Because § 2244(b)(3)(A) requires that, "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application," the district court further concluded that it lacked jurisdiction to entertain the application absent authorization from the court of appeals. Accordingly, the district court transferred the action to the Sixth Circuit under 28 U.S.C. §1631.[1] Petitioner filed with the district court on November 30 a notice of appeal from the district court's

[1] Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

transfer order. (R. 268, J.A. 11)(No. 01-6504) On February 11, 2002, the Sixth Circuit dismissed the appeal for want of jurisdiction. Specifically, the court ruled:

> The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction[.]

(J.A. 39) (emphasis in original).

Petitioner could not appeal as of right from the transfer order. As a general principle, it is well settled that transfer orders are not appealable final orders under 28 U.S.C. § 1291. *Ukiah Adventist Hospital v. Federal Trade Commission*, 981 F.2d 543, 546 (D.C. Cir. 1993). This settled rule against appealability applies to transfer orders issued pursuant to 28 U.S.C. § 1631. *Id.* (transfer from district court to court of appeals for lack of jurisdiction); *Persyn v. United States*, 935 F.2d 69, 72-73 (5th Cir. 1991) (transfer from district court to claims court); *Alimenta (USA), Inc. v. Lyng*, 872 F.2d 382, 383-85 (11th Cir. 1989) (same); *Raines v. Block*, 798 F.2d 377, 379-80 (10th Cir. 1986) (same); *Middlebrooks v. Smith*, 735 F.2d 431, 432-33 (11th Cir. 1984) (transfer between district courts). "The decisions in *Persyn*, *Alimenta*, *Raines* and *Middlebrooks* reflect the common sense view that section 1631 orders are interlocutory for the same reason that venue transfers are: the very purpose of transfer provisions is to allow the case to continue, rather than terminating it." *Ukiah*, 981 F.2d at 546.

Nor is the order here reviewable as a final judgment under the collateral order doctrine, which requires that the order satisfy at least three conditions: "it must

conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498 (1989) (citing *Richardson-Merrell Inc. v. Koller*, 474 U.S. 424, 431 (1985), quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (internal quotation marks omitted)). First, the collateral order doctrine is wholly inapplicable in this context. Clearly inherent in the doctrine is the notion that there should be an effective appeal from any "final" judgment. But, under § 2244's statutory scheme, Congress has determined that there should be no appeal from the final judgment at all. *See* 28 U.S.C. § 2244(b)(3)(E). Indeed, Congress has vested the court of appeals itself with primary and exclusive jurisdiction over the screening of second or successive petitions. 28 U.S.C. § 2244(b)(3)(A).

Furthermore, even if the collateral order doctrine were applicable, "[t]he courts have almost universally agreed that transfer orders fall outside the scope of the collateral order exception." *F.D.I.C. v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). Here, the transfer order fails to satisfy even the first requirement, that it "must conclusively determine the disputed question." It did not, because, as this Court noted in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), the transferee court, *i.e.*, the Sixth Circuit, had the power to revisit the decision. For the same reason, the transfer order lacks the third characteristic of an appealable collateral order. The collateral order doctrine is reserved for those situations in which a non-final order could not otherwise

be reviewed effectively. But petitioner could have obtained such review by filing a motion in the Sixth Circuit to retransfer. *See In re Carefirst of Maryland, Inc.*, 305 F.3d 253, 259 (4th Cir. 2002); *McGlamery*, 74 F.3d at 221. He did not do so. A transferee court is not bound by a § 1631 transfer that it determines to be "clearly erroneous," *Christianson*, 486 U.S. at 819; but, "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Id.* [2]

In short, petitioner's notice of appeal was ineffective to confer appellate jurisdiction upon the court of appeals to review the correctness of the district court's action treating the Rule 60(b) motion as a second or successive application and transferring the action to that court. Having correctly determined that the order in No. 01-6504 "[was] not an appealable order," the Sixth Circuit was also correct to order it "dismissed for lack of jurisdiction." (J.A. 39) (emphasis omitted).

It follows from what has been said, of course, that the Sixth Circuit did have the power to revisit the propriety of the district court's transfer order, but only in its capacity as the transferee court, *i.e.*, as an exercise of its original jurisdiction under § 2244(b)(3). "[I]t is familiar law that a federal court always has jurisdiction to determine

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[2] The order was not rendered "effectively unreviewable," and thus subject to the collateral order doctrine, because of concerns that concurrent jurisdiction could defeat review. *Cf. Goble v. Marsh*, 684 F.2d 12, 14 (D.C.Cir. 1982). A district court does not have concurrent jurisdiction to screen a second or successive application under 28 U.S.C. § 2244(b)(3). The order was also not appealable under 28 U.S.C. § 1292. The order did not grant or deny an injunction, *see* 28 U.S.C. § 1292(a)(1), nor did petitioner request certification from the district court under § 1292(b).

its own jurisdiction." *United States v. Ruiz*, 122 S.Ct. 2450, 2454 (2002). But petitioner did not properly invoke that review by filing a motion to retransfer the case back to the district court. Moreover, even if he had done so, review of transfer orders is deferential and subject to application of the law-of-the-case doctrine. *See Christianson*, 486 U.S. at 816. While transferee courts are empowered to revisit the transfer decision, "as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" 486 U.S. at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618, n. 8 (1983)). Application of the doctrine in this context is not a limit upon the transferee court's power, but "merely [an expression of] the practice of courts generally to refuse to reopen what has been decided." *Id.*, 486 U.S. at 817. Accordingly, to achieve the end of "quick settlement of questions of transfer," courts engaging in such review should "adhere strictly to principles of law of the case," *id.*, 486 U.S. at 819, and disturb only those transfer orders that are deemed "clearly erroneous." *Id.*

In any event, this case arrived in the court of appeals by transfer from the district court as a motion for leave to file a second or successive application for habeas relief. (J.A. 32) As *Christianson* makes plain, the court of appeals was not required *sua sponte* to second-guess the district court's characterization of the matter by reviewing the propriety of the transfer. Having received the case pursuant to a facially valid transfer order, the court of appeals was fully authorized to dispose of the case on the basis described in the transfer order, namely, as a motion under 28 U.S.C. § 2244(b)(3)(A).

II. THIS COURT DOES NOT HAVE CERTIORARI JURISDICTION TO REVIEW THE SIXTH CIRCUIT'S ORDER DENYING PETITIONER LEAVE TO FILE A SECOND HABEAS CORPUS PETITION.

As demonstrated above, the court of appeals lacked any independent basis of appellate jurisdiction to review the district court's transfer order—under 28 U.S.C. §1291, the collateral order doctrine, or 28 U.S.C. § 1292. It follows, therefore, that the sole basis upon which the case could have proceeded to judgment in the court of appeals was on the terms specified in the district court's transfer order, namely, as a motion for leave to file a second or successive habeas application, over which the courts of appeals enjoy original, exclusive jurisdiction under 28 U.S.C. § 2244(b)(3). The transfer statute, 28 U.S.C. §1631, dictates that a transferred "action . . . proceed as if it had been filed in . . . the court to which it is transferred . . .." Plainly, the case could not have been filed in the Sixth Circuit as a motion for relief from the district court's prior judgment in the original habeas case under Rule 60(b) of the Federal Rules of Civil Procedure. The courts of appeals have no original jurisdiction to dispose of Rule 60(b) motions.

"The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. §2244(b)(3)(E). Accordingly, this Court lacks jurisdiction to review the Sixth Circuit's February 11, 2002, judgment denying petitioner's motion. *Felker v. Turpin*, 518 U.S. 651, 661 (1996)("2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court").

Petitioner may not evade this jurisdictional restriction on the theory that the Sixth Circuit's judgment embodies a "predicate determination" concerning the true nature of his Rule 60(b) motion that this Court may somehow review, independent of the judgment itself. In the first place, it was the district court's transfer order, not the Sixth Circuit, which made the "predicate determination" characterizing petitioner's motion as one for leave to file a second habeas application. And, as previously demonstrated, the court of appeals lacked jurisdiction to consider petitioner's attempted appeal of the transfer order. While the court of appeals did endorse the district court's characterization of petitioner's Rule 60(b) motion (J.A. 36), the fact remains that the court of appeals could only have accepted and decided the case on the terms of the transfer—as a motion for leave to file a second or successive application.

Finally, even if the judgment below decided more than what was transferred from the district court and encompassed, in addition, an independent adjudication by the court of appeals concerning the true nature of the motion filed by petitioner in the district court, that adjudication could only have been made in the exercise of the Sixth Circuit's original, exclusive "gatekeeping" jurisdiction under the provisions of 28 U.S.C. § 2244(b)(3), as much so as when it ultimately denied the motion. The decision whether a petitioner is in fact seeking to file a second or successive application subject to the restrictions of §2244(b) cannot logically be separated from the decision whether to grant him leave to do so, and the provisions of §2244(b)(3)(E) expressly forbid review of such decisions by certiorari. In *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-2

(1998), this Court observed that, if the court of appeals there "had granted respondent leave to file a second or successive application [rather than deciding that the statutory restrictions did not apply], then [this Court] would be without jurisdiction to consider petitioner's petition and would have to dismiss the writ." So too here, where the court of appeals has decided that the restrictions of §2244(b) do apply and has denied leave to file a second or successive application, this Court lacks jurisdiction to review the decision and should dismiss the writ.

CONCLUSION

For the reasons set forth here, the writ of certiorari should be dismissed for lack of jurisdiction; alternatively, for the reasons set forth in respondent's merits brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded, electronically and by first-class mail, postage prepaid, to Thomas C. Goldstein, Goldstein & Howe, P.C., 4607 Ashbury Pl., NW, Washington, D.C., 20016; and by facsimile and by first-class mail, postage prepaid, to Bradley A. MacLean, Stites & Harbison PLLC, SunTrust Center, Suite 1800, 424 Church Street, Nashville, Tennessee, 37219-2376; and to William P. Redick, Jr., 810 Broadway, Suite 201, Nashville, Tennessee, 37203, on this the 31st day of October, 2002.

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(13)

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IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,
Petitioner,

v.

RICKY BELL, WARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide. Along with 80 state and local affiliate organizations, NACDL numbers 28,000 members in all 50 states.[1] The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge in the area of criminal justice and practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as amicus curiae on numerous occasions. *See, e.g., Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Hohn v. United States*, 524 U.S. 236 (1998). Because this case presents important questions regarding federal court review of the merits of habeas petitioners' federal constitutional claims, NACDL respectfully submits this amicus curiae brief.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or part and no person or entity, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is Petitioner Abdur'Rahman's first federal habeas petition. If this Court does not remand, Abdur'Rahman will be put to death without the merits of his constitutional claims of prosecutorial misconduct ever being addressed by a federal court, despite the fact that he properly presented them through the available state procedures and in his initial federal habeas petition. That result would run counter to the very purpose of federal habeas law, which is to ensure that all state prisoners have at least one opportunity to have a federal court fully review the merits of their timely filed federal constitutional claims.

In this habeas petition, Abdur'Rahman raised substantial claims that his conviction and death sentence violated the federal Constitution. Indeed, the District Court vacated his death sentence after finding prejudicial ineffectiveness of counsel (although the Sixth Circuit subsequently reversed the finding of prejudice *sua sponte*). *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1101 (M.D. Tenn. 1998), *rev'd*, 226 F.3d 696, 708-09 (6th Cir. 2000), *cert. denied*, 122 S. Ct. 386 (2001). The District Court refused to consider the merits of Petitioner's prosecutorial misconduct claims, however, on the ground that it was necessary to present them for discretionary review to the Tennessee Supreme Court in order to exhaust his state remedies. 999 F. Supp. at 1080. Since the time of the District Court's ruling of procedural bar – but before judgment on this first federal habeas petition has become final – the Tennessee Supreme Court unambiguously has clarified that discretionary review was not an available state remedy for Petitioner. Tenn. S. Ct. R. 39. Abdur'Rahman thus properly had exhausted the remedies available to him from the courts of Tennessee.

In light of the Tennessee Supreme Court's issuance of Rule 39 and this Court's intervening decision in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), the District Court's refusal to decide the merits of Abdur'Rahman's claims of prosecutorial misconduct was clearly erroneous as a matter of fact and law. Nevertheless, the Sixth Circuit denied Petitioner consideration of those claims, by blocking both his motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and his motion to the Sixth Circuit to amend its judgment. In so doing, the Sixth Circuit completely denied Petitioner the protection of the writ of habeas corpus.

Allowing the Sixth Circuit's ruling to stand would breach the fundamental principle that all habeas petitioners who properly exhaust and timely file their federal habeas petitions are entitled to consideration of the merits of their constitutional claims. Under these circumstances, it would elevate form over substance to treat a claim timely asserted in a first habeas petition as "second or successive" simply because relief is sought pursuant to Rule 60(b) or pursuant to a motion to a federal appeals court to amend its judgment. Rather than looking to "the particular name that [a procedure] bears," courts should look to the substance of what is at issue: here the first federal review of properly exhausted claims. *See Carey v. Saffold*, 122 S. Ct. 2134, 2140 (2002). To do otherwise, and to deny review, would "den[y] the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

In addition, an affirmance actually would disserve the principle of federal-state comity that underlies the exhaustion requirement for purposes of federal habeas review. To ignore a state supreme court's judgment regarding the scope of its own review would allow federal courts to burden state courts with

habeas petitions they do not want to hear. It also would inject uncertainty and confusion into habeas law by creating federal exhaustion requirements beyond those required by the state itself.

ARGUMENT

I. An Affirmance Here Would Contravene The Fundamental Principle That Habeas Petitioners Are Entitled To One Federal Court Review Of Timely Filed Petitions.

The "historic capacity" of federal habeas courts has been "to assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights." *Herrera v. Collins*, 506 U.S. 390, 402 (1993); *see also O'Neal v. McAninch*, 513 U.S. 432, 442 (1995) ("basic purposes underlying the writ" include "avoid[ing] a grievous wrong – holding a person 'in custody in violation of the Constitution . . . of the United States'"). To this end, habeas law provides that state prisoners are entitled to federal court review of the merits of their timely filed federal constitutional claims, provided they first exhaust available state remedies.

Because the writ of habeas corpus "has been for centuries esteemed the best and only sufficient defence of personal freedom," *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869), this Court has long held that state prisoners must have at least one opportunity to present claims of unconstitutional punishment and to have those claims "thoroughly considered" by federal courts. *See Lonchar*, 517 U.S. at 326. Accordingly, a habeas petition filed after dismissal of an initial petition for failure to exhaust state remedies must be addressed on the merits and cannot be dismissed as a "second or successive"

petition. *Slack v. McDaniel*, 529 U.S. 473, 485-89 (2000). Similarly, when federal habeas claims are dismissed as premature, the petitioner is entitled to reopen such claims for federal court adjudication once those claims ripen. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998). In short, where "the habeas petitioner does not receive an adjudication of his claim" due to an initial federal court dismissal, *id.* at 645, later proceedings must be adjudicated on the merits, "under the same standard as would govern those made in any other first petition," *id.* at 644. As this Court reasoned in *Martinez-Villareal*, "To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review." *Id.* at 645.

Such review for constitutional error is particularly vital in capital cases such as this one in order to ensure the reliability – and constitutionality – of death sentences. *See Herrera*, 506 U.S. at 405 (noting that "the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed"). In recognition of the role of habeas review in assuring the reliability of death sentences, this Court held in *Lonchar* and *Barefoot v. Estelle*, 463 U.S. 880 (1983), that both district courts and courts of appeals are obligated to address the merits of any first federal habeas petition prior to the petitioner's execution; if the petition cannot be dismissed on the merits prior to a scheduled execution, that execution must be stayed. *Lonchar*, 517 U.S. at 320 ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot."); *Barefoot*, 463 U.S. at 893-94 ("When a certificate of probable cause is issued by the district court . . . or later by the court of appeals, petitioner must then be afforded an opportunity to address the

merits, and the court of appeals is obligated to decide the merits of the appeal.").

No federal court has ever reviewed the merits of Abdur'Rahman's prosecutorial misconduct claims on the merits. An affirmance in this case would contravene the fundamental principle that every habeas petitioner who files a timely, properly exhausted petition is entitled to consideration of the merits of his claims.

II. To Require The Habeas Petitioner To Pursue Relief That The State Supreme Court Has Made Unavailable Would Pervert The Purposes Of The Exhaustion Requirement And Create Confusion In Habeas Law.

The District Court dismissed Petitioner's claims of prosecutorial misconduct as procedurally defaulted solely because he did not seek discretionary review of those claims from the Tennessee Supreme Court. *See Abdur'Rahman*, 999 F. Supp. at 1080 ("That the Tennessee Supreme Court exercises only discretionary review of post-conviction matters . . . does not excuse the petitioner from raising his claims before that court."). The District Court based this decision on the Sixth Circuit's decision in *Silverburg v. Evitts*, 993 F.2d 124 (6th Cir. 1993). In that case, the Sixth Circuit affirmed the dismissal of a habeas petition for failure to exhaust state remedies "because the petitioner's claims had not been presented to the Kentucky Supreme Court by way of a motion for discretionary review." *Id.* at 126.

While this case was on appeal to the Sixth Circuit, this Court decided *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), which affirmed the basic rule of *Silverburg*: a state prisoner must generally present his claims to a state supreme court in a

petition for discretionary review in order to satisfy the exhaustion requirement for federal habeas relief. *Id.* at 839-40. But in *O'Sullivan*, this Court indicated that state prisoners are required to petition for discretionary review *only* when that review is "part of the ordinary appellate review procedure in the State." *Id.* at 847. This Court thus established that, because the purpose of the exhaustion requirement is to promote federal-state comity, "nothing in the exhaustion doctrine requir[es] federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 847-48; *id.* at 849-50 (Souter, J., concurring); *id.* at 861-62 (Stevens, Ginsburg, Breyer, JJ., dissenting); *see also County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979) ("[I]f neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."). Accordingly, under the reasoning of *O'Sullivan*, there is no general federal rule requiring all state prisoners to petition for discretionary review to the state supreme court. Rather, federal courts must look to the appellate review procedures made available by the state to determine whether state remedies have been exhausted.

Subsequent to *O'Sullivan* but prior to issuance of the Sixth Circuit mandate in this case, the Tennessee Supreme Court promulgated Rule 39, which unambiguously provides that "a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error." Tenn. S. Ct. R. 39. The Order adopting the Rule expressly provides that the Rule was passed "to clarify" existing law – and not to change a prior rule. The Rule also states that it applies "[i]n all

appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967," *id.*, making clear that the Rule governs Petitioner's case.

With the promulgation of Rule 39, the Tennessee Supreme Court made absolutely clear that discretionary review was not available to Petitioner. The Rule clarifies that Tennessee's highest court takes seriously the limitations of its discretionary review rule, Tenn. R. App. P. 11, and that habeas petitioners and their counsel cannot petition for review of claims simply for exhaustion purposes. That satisfies the rule of *O'Sullivan*. As this Court recognized, to ignore such a clear statement by a state supreme court regarding the availability of certain appellate review procedures "disserves the comity interests underlying the exhaustion doctrine." *O'Sullivan*, 526 U.S. at 847. Tennessee, like other states, has made clear that it does not want the increased burden that would ensue if *all* habeas filings passed first through the doors of its highest court. *See id.* (recognizing that requiring habeas petitioners to file discretionary petitions "may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court"). In light of this Court's decision in *O'Sullivan* and Tennessee Supreme Court Rule 39, it is clear that Abdur'Rahman fully exhausted his state remedies when he presented his prosecutorial misconduct claims, which are indisputably substantial, to the Tennessee Court of Criminal Appeals.

To hold otherwise would perversely fail to accord full weight to a state supreme court's judgment regarding the scope and availability of its appellate review procedures, when the fundamental purpose of the exhaustion requirement is to accord due weight to the decisions of state courts. *See Duncan v.*

Walker, 533 U.S. 167, 178-79 (2001); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). Such a ruling also would create confusion and uncertainty in habeas law. It would allow federal courts to apply exhaustion requirements beyond those recognized by the states themselves, potentially barring the federal courthouse door to state prisoners who follow state directives concerning the availability of state appellate review procedures.

III. A Timely Filed, Exhausted Habeas Claim Should Be Considered On The Merits, Regardless Of The Rule Of Procedure Under Which Consideration Is Sought.

Both the District Court and the Sixth Circuit had the power and the opportunity to allow consideration of Petitioner's prosecutorial misconduct claims. Their failure to do so in this first federal habeas petition in a capital case – despite governing law establishing the clear error of the District Court's exhaustion holding – was clearly erroneous and a grave abuse of discretion.

After the District Court granted Abdur'Rahman's habeas petition and vacated his death sentence, the Sixth Circuit *sua sponte* reinstated that sentence on grounds never argued by the State. 226 F.3d 696, 708 (6th Cir. 2000); 999 F. Supp. at 1101-02. While Abdur'Rahman's petition for a writ of certiorari on that decision was pending, the Tennessee Supreme Court issued Rule 39. Following this Court's denial of that first petition for certiorari, *Abdur'Rahman v. Bell*, 122 S. Ct. 386 (2001), Petitioner promptly moved the Sixth Circuit to amend its judgment and remand to the District Court for further proceedings on his prosecutorial misconduct claims in light of Rule 39. Petitioner also moved for similar relief in the District

Court pursuant to Rule 60(b). Both the District Court and the Sixth Circuit denied Petitioner relief, reasoning that his requests were impermissible successive petitions.

A. Petitioner's Prosecutorial Misconduct Claims Should Be Considered Pursuant To Rule 60(b).

Rule 60(b) entitles Petitioner to relief from the District Court's erroneous procedural bar ruling and to consideration of the merits of his prosecutorial misconduct claim. Petitioner's 60(b) motion cannot be construed as a "second or successive" habeas petition within the meaning of 28 U.S.C. § 2244(b)(1) because the federal courts never adjudicated his prosecutorial misconduct claims on the merits, despite the fact that he raised them in his first attempt to acquire relief from a federal court after fully exhausting the available state remedies.

The Sixth Circuit relied on an inflexible rule that *any* Rule 60(b) motion to vacate a judgment denying habeas is always "the equivalent of a successive habeas corpus petition." *Abdur'Rahman v. Bell*, No. 98-6568, at 2 (6th Cir. Jan. 18, 2002) (citing *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996)). This cannot be squared with this Court's habeas jurisprudence, and is inconsistent with the rule in all of the other Circuits that have addressed the question.[2] As noted above, the crucial factor in determining whether a second

[2] *See Thompson v. Calderon*, 151 F.3d 918, 921 (9th Cir. 1998) (whether motion under Rule 60(b) was equivalent of "second or successive" petition judged on facts of particular case); *United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998) (same); *Felker v. Turpin*, 101 F.3d 657, 660 (11th Cir. 1996) (same); *Mathenia v. Delo*, 99 F.3d 1476, 1480 (8th Cir. 1996) (same); *Hunt v. Nuth*, 57 F.3d 1327, 1339 (4th Cir. 1995) (same); *see also Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001) (holding that Rule 60(b) motions do not constitute successive petitions).

attempt to receive federal court review is "second or successive" is whether the claims have ever been adjudicated on the merits. *See Slack*, 529 U.S. at 485-89; *Martinez-Villareal*, 523 U.S. at 644-45. This should hold true regardless of the label attached to that second attempt or the rule of federal procedure under which it is pursued. *See Carey*, 122 S. Ct. at 2140 (looking to "how a state procedure functions, rather than the particular name that it bears," for purposes of the federal habeas statute).

To hold otherwise would create procedural traps for habeas petitioners, who often proceed pro se, and elevate form over substance. Indeed, such a rule would be truly ironic here, where – unlike in *Slack* and *Martinez-Villareal* – the Petitioner actually brought a ripe, fully exhausted claim in his first federal habeas petition, and is merely trying to obtain review of the merits in that very case before judgment is even final. Moreover, such a categorical rule would strip the district courts of their equitable power in all habeas cases to correct mistakes in their judgment pursuant to Fed. R. Civ. P. 60(b)(1), or to remedy judgments that rest on fraud, Fed. R. Civ. P. 60(b)(3). To strip the federal courts of this power would contravene not only Rule 60(b), but the equitable purpose of the writ of habeas corpus.

Because the District Court erroneously dismissed Petitioner's prosecutorial misconduct claims on the ground that he had not exhausted his state remedies, his claims were never adjudicated on the merits. Under these circumstances, Petitioner's Rule 60(b) motion is not a "second or successive" habeas petition. Furthermore, the failure to adjudicate the prosecutorial misconduct claims rests on an erroneous view of the law, precisely the kind of error that Rule 60(b) is intended to give courts the power to correct. The very purpose of the

Rule is to "vest[] power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 234 (1995) ("Rule 60(b) . . . reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity.") (citation omitted). That power should have been exercised here to allow the Petitioner an opportunity to present his substantial claims of prosecutorial misconduct.

B. The Sixth Circuit Should Have Amended Its Judgment And Remanded To The District Court.

In addition, and alternatively, the Sixth Circuit should have granted Petitioner's motion to amend its judgment. The case was not yet final, as the Sixth Circuit had not yet issued its mandate. *See, e.g., Forman v. United States*, 361 U.S. 416, 426 (1960) (an appellate court's ruling is ineffective if "no mandate was ever issued thereon"), *overruled in part on other grounds by Burks v. United States*, 437 U.S. 1 (1978). In this situation, the Sixth Circuit clearly had the power to withhold its mandate and to reconsider its decision.[3] Federal courts exercise this authority where intervening developments call previous judgments and precedents into question. *See, e.g., Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1520 (9th Cir. 1989) (staying

[3]The Sixth Circuit had withheld its mandate during the pendency of the initial petition for certiorari. This is thus not a situation where the Sixth Circuit would even have had to recall its mandate. *See Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998) (noting appellate courts have the "inherent power to recall their mandates" in extraordinary circumstances).

mandate and granting rehearing on the basis of an intervening statute that caused the Supreme Court to vacate its earlier order granting certiorari); *Alphin v. Henson*, 552 F.2d 1033, 1034-35 (4th Cir. 1977) (withholding mandate and granting rehearing based on intervening change in statutory law). Rule 39 is precisely the sort of substantial intervening development that justifies further consideration, because it establishes the legal error in the District Court's holding that Petitioner failed to exhaust the available state remedies.

The Sixth Circuit did not explain its denial of the motion to amend its judgment. To the extent its ruling was based on the mistaken notion that the motion was somehow a "second or successive" habeas petition, that conclusion is erroneous for the reasons stated above. As with the Rule 60(b) motion, it would elevate form over substance to deny review on the merits of a petitioner's timely filed, properly exhausted claim simply because it was made in the form of a motion to amend the judgment.

To the extent the Sixth Circuit was exercising some discretion in denying the motion to amend its judgment, it was a grave abuse of discretion not to apply existing law to Abdur'Rahman's still pending appeal of his first federal habeas petition. This Court has recognized that a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Federal courts of appeals routinely reverse lower court dispositions for abuse of discretion when they rest on an erroneous view of the law. *See, e.g., Dusenberry v. United States*, 97 F.3d 1451 (6th Cir. 1996) (table decision), *aff'd*, 122 S. Ct. 694 (2002) (finding abuse of discretion when district court denied a motion for lack of jurisdiction in a due process challenge to forfeiture); *Firestone*

v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (holding that district court abused its discretion in denying leave to amend complaint, because it did so without meeting legal requirement of sufficient reason); *James v. Jacobson*, 6 F.3d 233, 242-43 (4th Cir. 1993) (finding abuse of discretion when court fails to exercise discretion based on legal or factual misapprehension); *Deitchman v. E.R. Squibb & Son, Inc.*, 740 F.2d 556, 563-64 (7th Cir. 1984) (holding judge abuses his discretion when his ruling is based on erroneous conclusion of law). Similarly, this Court in *Foman v. Davis*, 371 U.S. 178, 182 (1962), held that a district court's refusal to grant leave to amend was an abuse of discretion because it was based on an erroneous interpretation of Rule 15(b) and the "spirit of the Federal Rules [of Civil Procedure]."

In refusing to remand, the Sixth Circuit abused its discretion by leaving Petitioner no avenue for federal court review of the merits of his constitutional challenges to his death sentence, while letting stand an erroneous holding of procedural default of those very claims. The Sixth Circuit's action here is akin to that condemned by this Court in *Lonchar*, where the Court concluded that "a district court would abuse its discretion" if it allowed an execution to proceed before it could address the habeas petitioner's claims on the merits. *Lonchar*, 517 U.S. at 320. Similarly, it would be an abuse of discretion to permit the execution of Abdur'Rahman without ever affording him a single opportunity to present the merits of his constitutional claims to a federal court.

CONCLUSION

The orders of the Court of Appeals should be reversed and the case remanded to the District Court for consideration of the merits of Petitioner's prosecutorial misconduct claims.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Sixth Circuit

BRIEF FOR FORMER PROSECUTORS JAMES F. NEAL, W. THOMAS DILLARD, QUENTON I. WHITE, JUDGE JOHN J. HESTLE, RALPH E. HARWELL, AND CHARLES FELS, *AMICI CURIAE*, IN SUPPORT OF PETITIONER

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Former prosecutors James F. Neal, W. Thomas Dillard, Quenton I. White, Judge John J. Hestle, Ralph E. Harwell, and Charles Fels file this Amici Curiae brief in support of Petitioner pursuant to Supreme Court Rule 37.3(a). The parties have consented to the filing of this brief.*

INTEREST OF AMICI CURIAE

James F. Neal, W. Thomas Dillard, Quenton I. White, Judge John J. Hestle, Ralph E. Harwell, and Charles Fels are attorneys who formerly served as state or federal prosecutors in the State of Tennessee. James F. Neal served as a Special Assistant to the Attorney General of the United States, 1961-64; United States Attorney for the Middle District of Tennessee, 1964-66; Chief Trial Counsel, Watergate Special Prosecution Force, 1973-74; Chief Counsel, Senate Select Committee to Study Undercover Operations of the Department of Justice, 1982; and currently is a partner at Neal & Harwell. W. Thomas Dillard served as an Assistant United States Attorney for the Eastern District of Tennessee from 1967–76; First United States Attorney for the Eastern District of Tennessee, 1978–83; United States Attorney for the Northern District of Florida, 1983–86; and United States Attorney for the Eastern District of Tennessee, August to December of 1991. Quenton I. White served as United States Attorney for the Middle District of Tennessee, 2000-01. Judge John J. Hestle served as an Assistant District Attorney General for the Nineteenth Judicial District of Tennessee from 1970–74; and District Attorney General for the nineteenth Judicial District of Tennessee, 1974–82. Ralph E. Harwell served as an Assistant District Attorney General for the Sixth

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* Letters of consent have been filed with the Clerk of the Court. No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than Amici Curiae and their counsel made a monetary contribution to the preparation or submission of the brief.

Judicial District of Tennessee from 1969–76. Charles Fels served as an Assistant United States Attorney for the Middle District of Tennessee from 1974–77; Assistant District Attorney General for the Sixth Judicial District of Tennessee (Knox Co.), 1979–82; and Assistant United States Attorney for the Eastern District of Tennessee from 1982–84.

As a result of their former positions, Amici have a shared interest in the maintenance of high ethical standards in the prosecution of Tennessee criminal cases.

Amici Curiae submit that the habeas corpus petition in this case raises serious issues of prosecutorial misconduct that should be reviewed by the federal courts. The Assistant District Attorney General assigned to the case withheld important evidence from the defense and misled the court, the jury and defense counsel about relevant facts.

As former law enforcement officials, we each possess a personal appreciation for the unique role of the prosecutor in the American criminal justice system. Former Tennessee Attorney General Michael Cody has written: "We want to make sure that the perpetrators of heinous crimes are caught, tried and punished. But we must also ensure that we have the right person and that the perpetrators are convicted and punished within the guidelines of our Constitution." W.J. Michael Cody, The Death Penalty in America: Its Fairness and Morality, 32 U. Mem. L. Rev. 919, 920 (2001).

Prosecutors bear an ethical duty to search for the truth and present only the truth to the jury. The government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). See also State v. Spurlock, 874 S.W. 2d 602, 611 (Tenn. Crim. App. 1993)(quoting Berger).

All of us handled serious felonies and several of us handled capital matters when we served as prosecutors.

Charles Fels, Judge Hestle, and Ralph E. Harwell each prosecuted cases in which the death penalty was sought. We carried out that responsibility with a heightened sense of our ethical obligations. It is an awesome task to build a case for the State to take a man's life and to argue to a jury that it should return a death sentence. While the consequence of prosecutorial misconduct is serious in any criminal prosecution, it is harrowing in a capital case.

Further, as members of the Tennessee Bar, we are familiar with the customs and practices of our state's criminal courts. Among us, we have personally handled or supervised thousands of criminal prosecutions in the federal courts and in the state courts of Tennessee. This case is atypical. The prosecution of Petitioner fell far short of the standards of our state court system and, indeed, below what we understand the federal constitutional minimum standards to be. In our view, the record below taints all members of the Tennessee Bar and especially those of us who had the privilege of representing the State of Tennessee or the United States in the courts of our State and in the federal courts.

This case presents to the Court a complex procedural question involving the interaction of certain federal statutes and court rules. Amici Curiae do not purport to address that question in this brief. Instead, we inform the Court of our view that there are substantial constitutional issues underlying the procedural issue addressed by the parties. Petitioner's prosecutorial misconduct claims have never been fully addressed by the federal courts. Amici urge the Court to resolve the procedural issues in a manner that permits review of the Petitioner's serious claims of prosecutorial misconduct.

STATEMENT OF THE CASE

In state and federal habeas petitions, Petitioner presented claims and evidence of prosecutorial misconduct in

his capital trial. Because of procedural rulings below, no federal court has addressed these constitutional claims in their totality. If this Court agrees with Petitioner that the District Court should have granted his Rule 60(b) motion, Petitioner will finally have an opportunity for meaningful federal review of prosecutorial misconduct that denied him a fair trial and that undermines confidence in his death sentence.

The prosecutorial misconduct in this case involved the withholding and misrepresentation of evidence on key issues, including: the identity of the person who did the stabbing; the circumstances of a prior homicide used as an aggravating circumstance in support of the death penalty; and Petitioner's mental condition, a condition that should have been presented to the jury in mitigation of the death sentence and that would have shed light on Petitioner's bizarre inculpatory testimony in the penalty phase of the trial.

The district court held that it could not address most of Petitioner's prosecutorial misconduct claims, because they had not been raised in a petition for discretionary review to the Tennessee Supreme Court. Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1080 (M.D.Tenn. 1998). The district court addressed two issues it found to have been exhausted: the prosecutor's failure to provide trial counsel the lab report stating that no blood was found on the coat or other clothing Petitioner had worn on the night of the crime, and the prosecutor's failure to provide defense counsel a transcript of Petitioner's 1972 trial for murder. 999 F. Supp. at 1083. That transcript would have made clear to counsel that the earlier event did not involve gangs and drugs, as the prosecutor asserted, but was the result of homosexual assaults on Petitioner in prison. In addition, the transcript included testimony from two psychiatrists, including one for the government, that Petitioner was not able to control his behavior, information that would have been crucial in Petitioner's sentencing hearing.

Of the two issues it addressed, the district court found that the former was not misconduct because the prosecutor had supplied the lab report to Petitioner's prior counsel, and the latter failure to disclose evidence, although unlawful under Brady, did not, "standing alone," warrant habeas relief. 999 F. Supp. at 1090. Because the district court did not consider the extensive remaining misconduct in the case, it did not address how these two matters related to Petitionier's claim that the prosecutor undertook a concerted effort to withhold and distort evidence he knew would make it difficult to secure a death sentence. Nor did the court consider the aggregate effect of the misconduct on Petitioner's sentencing-phase defense and on the jury's search for the truth. No federal court has addressed the full range of the prosecutor's misconduct.[1]

SUMMARY OF ARGUMENT

Early in his investigation, the prosecutor recognized flaws in his case for a death sentence against Petitioner. The

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[1] Both the Tennessee Supreme Court and the district court noted other misconduct by the prosecutor. The Tennessee Supreme Court found that the prosecutor's conduct in getting improper evidence before the jury "bordered on deception." State v. Jones, 789 S.W.2d 545, 552 (Tenn. 1990). The district court found that the prosecutor misrepresented to defense counsel the circumstances of Petitioner's prior conviction. Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1099-1100 (M.D. Tenn. 1998)("[t]he prison murder was not about drugs and gangs as represented by the prosecution to defense counsel"). In addition, as the district court recognized, the habeas petition raised numerous other allegations of prosecutorial misconduct, none of which was addressed by the district court, because it deemed them not to have been exhausted. 999 F. Supp. at 1082 n. 8. See also Rule 60(b) Motion at pp. 7-8.

scientific evidence strongly suggested that Petitioner was not the stabber, raising doubts the prosecutor knew would preclude capital punishment. The evidence at the habeas corpus hearing indicates that the prosecutor masked the weaknesses in his case by suppressing key documents and presenting misleading testimony from an accomplice.

The prosecutor relied heavily on a prior homicide conviction in his request for the death penalty. In order to prevent the defendant from explaining mitigating facts concerning this prior offense, the prosecutor misrepresented those facts to defense counsel and falsely represented that an FBI agent would testify to the prosecutor's version of the events if the defense put those circumstances at issue.

The prosecutor was aware that Petitioner had a significant mental health history and had engaged in psychotic behavior that might mitigate the death sentence and that might have explained his bizarre testimony at the sentencing hearing. The prosecutor suppressed police reports documenting Petitioner's psychotic symptoms and provided false information concerning Petitioner's mental history to the state agency charged by the court with evaluating Petitioner's mental state.

The evidence presented at the habeas corpus hearing indicates that the prosecutor's conduct was a gross deviation from the standards of the legal profession. The prosecutor's duty is to seek justice, not merely to convict. American Bar Association, Standards for Criminal Justice: The Prosecution Function, 3-12(c) (3d ed. 1993). The deception engaged in by the prosecutor in this case is incompatible with that duty.

The prosecutor's conduct also deprived Petitioner of due process. The prosecutor engaged in the knowing suppression of favorable evidence, Brady v. Maryland, 373

U.S. 83 (1963), and the knowing misrepresentation of evidence. Miller v. Pate, 386 U.S. 1 (1967).

The record of this case indicates that the prosecutor engaged in a pattern of deception that deprived Petitioner, and ultimately the jury, of information that would have fundamentally altered the calculus in the sentencing phase of Petitioner's trial. No valid interest will be served by allowing Petitioner to be executed without federal review of the full course of prosecutorial misconduct that occurred in this case.

ARGUMENT

I. The Prosecutor Withheld and Misrepresented Evidence to Convince the Trial Jury that Petitioner, Rather than an Accomplice, Performed the Stabbing.

Evidence that Petitioner was the actual stabber was crucial to the jury's willingness to impose the death penalty. The prosecutor testified in the district court that he knew that Nashville jurors are "tougher to get death sentences from" than other Tennessee jurors. H.T. 905. They will not impose death verdicts unless they can be "sure beyond a shadow of a doubt that the person the state is seeking the death penalty on was in actuality responsible for the murder." Id. The defendant must be the "shooter or the sticker." H.T. 907. In his sentencing-phase summation, the prosecutor's co-counsel stated that "the main issue in this case was who was the sticker, who wielded that knife." T.T. 1944.

The prosecutor understood that, if all of the evidence were known, it would be difficult to persuade the jury that Petitioner was "the sticker." In a March 24, 1987 internal memorandum, the prosecutor listed several "Weaknesses in the Case" for "seek[ing] the death penalty." H. Ex. 42. First was the difficulty of proving that Petitioner himself was the stabber. The surviving victim, Norma Norman, was

blindfolded and did not see who stabbed the deceased or herself. H. Ex. 42. Ms. Norman had described Petitioner as wearing a full-length black "gangster coat." T.T. at 1343. Police had seized the "long black coat" at Petitioner's home shortly after the incident.[2] At trial, the prosecutor displayed the coat seized from Petitioner's home as the "gangster coat" worn during the murder. T.T. at 1673. There was, however, no blood found on any of the clothing seized from Petitioner, including the coat that witnesses said Petitioner wore during the incident. See T.T. at 277, 292, 322, 331-333, 341.

The prosecutor understood the significance of the lack of blood on the long black coat. As he explained to a supervisor, "[p]hotographs of the decedent's house show blood spattering all over the kitchen." H. Ex. 42. Likewise, the police reports and the autopsy report confirmed that the stabbing had produced a copious quantity of blood. H. Ex. 1-4; H. Ex. 14. The lead detective observed the "large amount of blood splattering on items near the victim [and] on the walls, bar, and divider," H. Ex. 3, and concluded, as he explained in the habeas proceedings, that the blood splatter would have occurred following each blow to the heart. H. Ex. 110 at 42-43.[3] The prosecutor concluded in the report to his

[2] The prosecutor's file memorandum noted that it was very unlikely the coat had been cleaned or replaced with a different coat, because the police also found a shotgun under Petitioner's bed, and he surely would have disposed of the gun if he cleaned or replaced the coat. See H. Ex. 42 at 678. In any event, forensic tests would have detected traces of blood, even if the coat had been cleaned. H.T. 35-36, 59-61.

[3] Expert testimony at the district court hearing confirmed that, if Petitioner had squatted over the decedent as the prosecution contended, he would have been copiously spattered with blood. Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1085 (1998) (citing T.T. at 37-39, 77).

supervisor that there were only two reasonable possibilities: "Either the defendant removes his coat before he began to stab these people . . . or if the defendant did wear this coat the entire time he obviously was not present when the stabbing occurred." H. Ex. 42.

The prosecutor had no evidence that Petitioner removed his coat. In fact, the only neutral witness who saw Petitioner during or shortly before or after the stabbing said that Petitioner had on the long black coat. In a statement to police shortly after the events, Norma Norman's daughter said that she had "peeped" out of her bedroom into the kitchen during the incident and that Petitioner, the "light skinned" man in glasses, "had on a wool coat." H. Ex. 6.

Petitioner's co-defendant, Devalle Miller, gave police a three-hour oral confession in which he admitted taking part in the assault but said that Petitioner was the stabber.[4] The prosecution also interviewed Miller for an additional thirteen hours over the course of four interviews during the week before the guilt and sentencing phases of the trial. F.T. 1034-8. Miller never said that Petitioner removed his coat and strongly implied the contrary. Yet the prosecutor relied on Miller to explain away the absence of blood from petitioner's clothing: "Miller stated that the stabbing of the deceased did not produce the blood that was spattered, but that the blood that was splattered occurred as the deceased gasped for air after the defendant had gone to the second victim and begun to stab her." H. Ex. 42 (emphasis in original). Given his own statements to his supervisor, his confirmatory testimony in post-conviction proceedings, and the conclusion his lead detective reached based on experience investigating homicide scenes, the prosecutor surely knew Miller's explanation was

[4] Miller fled Tennessee after the murder. The clothing he wore during the incident was never located or tested for blood.

inconsistent with the evidence and with his own internal memorandum. See H.T. 917; H Ex. 42; H. Ex. 110 (pp. 42-43).

The prosecutor shielded from the defense and the jury this major weakness in his case. The jury heard none of the evidence establishing that the person who did the stabbing would have been covered with blood, that Petitioner's long black coat had no traces of blood and that witnesses saw Petitioner in the long black coat and did not see him remove it.

First, the prosecutor withheld from the defense the police reports describing the "large amount of blood splattering on the items near the victim . . . on the walls, bar and divider." H. Ex. 3; H. Ex. 1, 2, and 4. The prosecutor did not turn over the lead detective's notes on the blood splatter, nor did the detective describe the blood splatter to the jury. T.T. 1583-1625. Second, the prosecutor withheld from the defense Shonta Norman's statement that Petitioner (the "light skinned" man "in glasses") "had on a wool coat" when she looked into the kitchen after hearing the decedent making a choking sound that probably was the result of the stabbing. H. Ex. 6. Third, the prosecutor withheld from trial counsel the lab report showing no blood on Petitioner's coat, pants and shoes, H. Ex. 9A; the prosecutor gave this report to Petitioner's original lawyer but did not give it to Petitioner's trial counsel, who requested discovery. [5]

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[5] The district court found no Brady violation in the prosecutor's failure to give trial counsel the lab report, because he had given it to prior counsel. 999 F. Supp. at 1089. The district court ruled that defense counsel was ineffective for failing to obtain the report. The district court did not rule on the prosecutor's purposeful distortion of the evidence concerning the identity of the stabber, of which the withholding of the lab report was only one aspect.

The prosecutor took advantage of defense counsel's lack of information[6] and presented to the jury a version of the facts the prosecutor knew was irreconcilable with the physical and medical evidence. The prosecutor presented Devalle Miller's testimony that Petitioner "squatted over [the victim] stabbing him," with no testimony that Petitioner removed the black coat. The prosecutor thus created the misleading impression, contrary to his own understanding, that Petitioner could have stabbed the victim while wearing the long black coat. The prosecutor also elicited testimony from Miller that would resolve the apparent inconsistency between this version of events and the lack of blood on the coat, had defense counsel realized the conflict. Miller testified that, after Petitioner stabbed the victim, "[h]e backed up off the victim, a couple of feet, and just stood, you know . . . ." T.T. 1472. Then, Miller testified, the victim started going into convulsions. Miller testified that the victim was lying face down and when the convulsions started, the "blood started spewing from his nose and out of his mouth." T.T. 1472-73. That version of events seemed to place the stabber far enough away from the victim to avoid being covered with blood, but, as the prosecutor knew, it was inconsistent with the medical evidence. In closing, the prosecutor assured the jury that "Devalle Miller told you the truth," T.T. 1944.

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[6] Even though the prosecutor withheld crucial police reports and other documents, competent defense counsel might have learned enough about the facts to challenge the prosecutor's version of events. The prosecutor realized that defense counsel knew little about the facts, see H.T. 1040-41, and exploited that lack of preparation. The prosecutor's conduct was no less improper because competent counsel might have minimized the damage. In fact, in the view of Amici, the prosecutor's exploitation of defense counsel's inadequacies in order to win at any cost was a gross deviation from his obligation to seek justice.

Thus, the prosecutor successfully hid from both the defense and the jury evidence tending to prove that Petitioner was not the stabber. Even though prior counsel had the lab report, the prosecutor's failure to produce it to defendant's trial counsel, when another lab report was produced as potentially "material to the preparation of the defense," H. Ex. 62, "had the effect of representing to the defense that the evidence [did] not exist." Bagley v. United States, 473 U.S. 667, 682-83 (1985) (an incomplete response to a specific discovery request may cause more harm than a complete non-disclosure).

As a result, defense counsel never appreciated the significance of the evidence that Petitioner wore the coat throughout the incident. Even if defense counsel had seen the lab report regarding the coat, the prosecutor's failure to produce the evidence of where and when the blood splattered masked the significance of that report. Neither the defense nor the jury heard the evidence demonstrating that whoever stabbed the victim must have been covered with blood, or the recollection of Shonta Norman that Petitioner was wearing the coat when she observed him during the incident.

The prosecutor's conduct was improper. The prosecutor engaged in a "deliberate deception of the court and jury" in violation of the most fundamental standards of due process. Mooney v. Holohan, 294 U.S. 103, 112 (1935). He knowingly withheld exculpatory information, Brady v. Maryland, 373 U.S. 83 (1963), and knowingly misrepresented the physical evidence in the case. Miller v. Pate, 386 U.S. 1, 7 (1967).

The prosecutor's conduct in this case bears a disturbing resemblance to more recent conduct by this same prosecutor which required reversal of a different first degree murder conviction. In Garrett v. State, 2001 WL 280145 (Tenn. Cr. App. March 22, 2001), this same prosecutor argued

to a jury that the defendant locked the victim in the room of a house and then burned the house down. The Tennessee appellate court reversed the defendant's murder conviction, because the prosecutor suppressed a report in which the Fire Detective said the door to the room was, in fact, unlocked. This misconduct resulted in a public censure of this prosecutor by the Tennessee disciplinary board, In re Zimmermann, No. 24039-5-CH (Tenn. S. Ct. Disciplinary Bd. of Prof. Resp. May 28, 2002), which was the second public censure this prosecutor has received.[7]

In the view of Amici, the misconduct in this case likely affected the jury's decision to impose a death sentence.

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[7] For the prosecutor's history of similar misconduct, see the lower court opinions in this case, State v. Jones, 789 S.W.2d at 552 (Zimmermann's actions in promising not to pass prejudicial indictments to the jury then doing so "bordered on deception"); Abdur'Rahman v. Bell, 999 F. Supp. at 1089-90 (Zimmermann improperly withheld exculpatory evidence from, and misrepresented facts to, the defense); and in other cases, see, e.g., In re Zimmermann, 1986 WL 8586 (Tenn. Cr. App. 1986) (Zimmermann's violation of disclosure rules constituted "abuse of . . . proceedings of the court"); Zimmermann v. Board of Prof. Resp., 764 S.W.2d 757 (Tenn. 1989) (Zimmermann reprimanded for improper comments to the press); In re Zimmermann, No. 12128-5-LC (Tenn. S. Ct. Disciplinary Bd. of Prof. Resp. Sept. 30, 1994) (Zimmermann publicly censured for public statements questioning a trial judge's candor); State v. Middlebrooks, 995 S.W.2d 550, 558-59 (Tenn. 1999) (Zimmermann's representations to the jury in a capital case displayed "either blatant disregard for . . . or a level of astonishing ignorance of . . . the law"); State v. Vukelich, 2001 Tenn. Cr. App. LEXIS 734 (2001) (Zimmermann "strongly admonished" for soliciting the same "patently improper" testimony that had prompted a prior reversal).

As the prosecutor knew, the jury likely would not have imposed the death sentence if it had doubts whether Petitioner was the stabber. Absent the prosecutor's successful efforts to distort the evidence, the jury would have had doubts whether Petitioner carried out the murder.

II. The Prosecutor Withheld and Misrepresented Evidence to Distort the Nature of Petitioner's 1972 Homicide Conviction.

The state alleged Petitioner's 1972 conviction for second degree murder while in a federal prison as an aggravating circumstance supporting the death penalty. H. Ex. 59. The prosecutor anticipated, and expressed concern in his memorandum to his supervisor, that the defense would attempt to diminish the significance of the prior conviction by explaining that the murder occurred when Petitioner was trying to prevent a homosexual rape. H. Ex. 42 at 679. The prosecutor obtained a transcript of the earlier trial, but did not produce the transcript to the defense. Instead, he brought an FBI agent who had been involved in the earlier case to attend this trial and listed him as a witness. With the agent present, the prosecutor related to defense counsel that the 1972 homicide had resulted from "a turf war in the prison between the two gangs as to who would control the drug trade in the prison." H. Ex. 136 at 25. That threat dissuaded defense counsel from presenting the defendant's explanation of the circumstances of the prior homicide, circumstances the district court found could have mitigated the impact of this prior homicide on the jury's decision whether to impose death. 999 F. Supp. 1073, 1095 n. 27.

At the state habeas proceeding, the prosecutor admitted that his purpose was to prevent the defense from "getting into this 1972 murder," H. Ex. 136, ex. 9, and claimed that he had related to defense counsel what he had been told by the FBI agent who investigated it. The FBI

agent testified in a deposition, however, that the killing occurred in response to a dispute between Petitioner and the decedent concerning rumors of homosexual conduct between them. According to the agent, after Petitioner confronted the decedent, Petitioner lost control and stabbed him. H. Ex. 136 at 18-19. The killing was not about a drug turf war, as the prosecutor told defense counsel.[8]

The federal district court found that defense counsel was ineffective in not investigating Petitioner's prior convictions. 999 F. Supp. at 1099. The district court also found that the prosecutor had misrepresented to defense counsel the circumstances of the 1972 conviction, 999 F. Supp. at 1089, but believed that the prosecutorial misconduct claim was not properly before it. Thus, no federal court has ruled on the prosecutor's conduct in purposefully misstating the record of the 1972 trial in order to dissuade Petitioner from explaining to the jury the circumstances of this prior homicide in a light that might have affected the jury's determination whether to impose the death sentence.

The prosecutor's misconduct was egregious. If, as it appears, he made a representation to defense counsel he knew to be false in order to cut off an avenue of defense, that falsehood violates all standards of professional conduct. See National District Attorney's Association (NDAA), National Prosecution Standards 6.5 (2d ed. 1991) ("Counsel should proceed with candor, good faith and courtesy in all relations with opposing counsel"); Tennessee Supreme Court Rule 8,

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[8] Because the prosecution theory was that this killing was motivated by drug turf, the threat that an FBI agent would testify about an earlier killing with the same motivation would have been devastating. See T.T. 1941, 1979 (closing argument linking evidence that the defendant was trying to "take over" drug turf to prior murder); see also id. at 1981, 1984, 1985 (rebuttal argument).

Code of Professional Responsibility, DR 7-102(A)(5) (a lawyer shall not knowingly make a false statement of law or fact). It also violates the prosecutor's fundamental duty "to see that, so far as possible, truth emerges." Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in the judgment). See Wood v. Bartholomew, 516 U.S. 1, 9 (1995) (per curiam) (confirming that, if the prosecution's denial that polygraph examinations of the two witnesses existed were an intentional misstatement, the Court "would not hesitate to condemn the misrepresentation in the strongest terms").

In the experience of Amici, the existence of a prior homicide, particularly one in prison, is a significant factor in the jury's determination whether life imprisonment is sufficient to guarantee the safety of the community. A killing over gangs and drugs presents a very different picture of the cold-bloodedness and dangerousness of a defendant than does an outburst stemming from a series of homosexual assaults on the defendant while he was incarcerated and unable to escape from them. In the view of Amici, the prosecutorial misconduct that has been described in this case was sufficient to have swayed the jury's determination whether to impose a sentence of death.

III. The Prosecutor Withheld and Misrepresented Evidence Regarding Petitioner's Mental Health.

The prosecutor's false representation to defense counsel of the facts of the 1972 homicide was part of an even larger distortion. The prosecutor systematically suppressed and misrepresented the evidence of Petitioner's mental illness and the connection between that mental illness and Petitioner's past and present crimes.

Petitioner has an extensive, well-documented history of mental illness, none of which was presented to the jury. As

the district court recognized, Petitioner was diagnosed in 1964 as having a "paranoid personality." 999 F. Supp. at 1098. In 1972, a psychiatrist testified that Petitioner suffered from a Borderline Psychosis that caused him to lose control under stress. 999 F. Supp. at 1100. Petitioner repeatedly had exhibited psychotic symptoms, including banging his head against a wall when he was under stress. H.T. 123-124.

The district court correctly found that defense counsel fell short of their duties in not investigating Petitioner's mental history and presenting it to the jury. 999 F. Supp. at 1096-98. But the prosecutor's affirmative steps to conceal that history are distinct from, and not excused by, defense counsel's failings.

When Petitioner was brought to the police station following his arrest in this case, he began to cry and bang his head against the wall. H. Ex. 7. Reports from the Davidson County Sheriff's Department stated that Petitioner was banging his head against the floor, requiring that he be placed in a padded cell on "suicide" watch. H. Ex. 8. The prosecutor never disclosed the police reports describing that behavior. When the police report describing petitioner's arrest was turned over at trial as Jencks material, the facts relating to petitioner's extreme emotional distress had been redacted. Id.

The prosecutor expected that Petitioner's mental illness likely would be an issue at trial and sentencing and knew that Petitioner had raised his mental illness in defense of his earlier convictions. H. Ex. 15 (letter to Lewis Trammell, Petitioner's federal parole officer); H. Ex. 72 (defense counsel notice of intent to rely on mental status defense). He obtained the transcript of the 1972 homicide trial and sought information from the prosecutor in the 1972 trial and from Petitioner's federal parole officer. From those sources, the prosecutor learned that, in addition to claiming that he was

defending himself against a homosexual assault, Petitioner had raised an insanity defense in the 1972 trial. A psychiatrist testified at the 1972 trial that Petitioner was insane at the time of the offense due to a mental disease ("borderline" psychosis) that caused him to lose control under stress. H. Ex. 131 at 43-46. The jury in that case rejected the first-degree murder charge and convicted him of second degree murder, and Judge Merighe sentenced Petitioner to a psychiatric facility.

Upon motion of defense counsel in this case, Petitioner was sent to the Middle Tennessee Mental Health Institute ("MTMHI") for evaluation and a report to the court. H. Ex. 22. MTMHI sought information from the prosecutor concerning Petitioner's mental history. The prosecutor replied with information he knew to be false and calculated to affect the MTMHI report, to discourage investigation into Petitioner's mental history and, instead, to paint Petitioner as a cold-blooded killer. H. Ex. 34.

The prosecutor reported to MTMHI that, in the 1972 proceedings, Petitioner "moved the Court for a competency hearing and psychiatric evaluation as to his sanity. . . . the Court ruled that the defendant was competent and . . . there appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial." H. Ex. 34 at 3 (emphasis added); see H. Ex. 36 (MTMHI report omitting mention of 1972 insanity defense). That representation stands in stark contrast to the prosecutor's earlier report to his supervisors concerning the 1972 trial. There, the prosecutor reported that he had "received a copy of the transcript of the defendant's first trial where he plead not guilty by reason of insanity." H. Ex. 42 at 679.

In addition to his misrepresentation concerning Petitioner's assertion of an insanity defense, the prosecutor

falsely informed MTMHI that the 1972 offense was a "cold blooded premeditated murder" by Petitioner, the leader of a "prison gang attempting to gain control over the victim's gang." H. Ex. 34 at 201. The prosecutor knew that his statement was false, that the 1972 incident involved a homosexual advance or threats, that there was no evidence that gangs or drugs were involved, and that the jury had rejected a first degree premeditated murder charge and convicted Petitioner of a lesser offense.

The prosecutor also withheld information that was clearly relevant to MTMHI's assessment of Petitioner. The prosecutor did not inform MTMHI of Petitioner's behavior after his arrest or the fact that, upon his arrest, two days after the offense, he was placed in a padded cell on suicide watch, where he remained for two days. H. Ex. 7. Nor did the prosecutor provide MTMHI with any records of the insanity defense raised in the 1972 trial or of the 1970 assault, which included a government motion for a psychological evaluation prompted in part by Petitioner's head-banging and suicide attempts. H. Ex. 131.

Misled by the prosecutor's representations, the MTMHI evaluators reported to the court that they found no issues regarding competency and no basis for an insanity defense. The report did not mention the 1972 insanity defense. The prosecutor then moved, *in limine*, to preclude the defense from asserting any mental state defense. The prosecutor cited the MTMHI report "clearly show[ing] that the results of the defendant's evaluation reflect no diagnosis of any mental disease, defect, emotional disturbance or even a personality disorder." H. Ex. 73.[2]

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[2] The prosecutor's Motion also stated that "the co-defendant...has no evidence" that Petitioner was suffering from a mental disease. H.Ex. 73. Miller had given the prosecutor a statement in which he said that Petitioner "went

The prosecutor's conduct was improper. He suppressed exculpatory evidence in violation of Brady v. Maryland and gave false information to the MTMHI, an agency directed by the court to report on Petitioner's mental condition. See American Bar Association, Standards for Criminal Justice: Prosecution Function 3-2.8 (a) (Commentary) (3d ed. 1993) ("It is fundamental that in relations with the court, the prosecutor must be scrupulously candid and truthful in his or her representations in respect to any matter before the court . . . it is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice").

The prosecutor's conduct also had an effect on the course of the sentencing hearing. His suppression of evidence and false representations concerning Petitioner's mental history effectively discouraged any further examination into Petitioner's mental condition. Informed that an evaluation in the federal system in 1972 revealed no basis for concerns about competency or insanity, and provided with no current evidence of mental illness, MTMHI did little to further investigate Petitioner's mental illness. Everyone in the court system, including MTMHI, the trial judge and defense counsel, was lulled into the belief that there were no serious issues concerning Petitioner's mental condition.[10]

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from day to night" and was acting "crazy." Notes on Miller's statement indicated that it suggested "Insanity and [a] mitigating factor." H. Ex. 73, 51 (pp. 166-67, 171, 177).

[10] Of course, the district court is correct that defense counsel should have obtained Petitioner's records, because competent counsel in a case that may result in the death penalty always should be fully informed about the defendant's background. The fact that competent counsel might have been able to limit the damage caused by the prosecutor's suppression of evidence and affirmative misrepresentations does not change

Dr. Craddock, the MTMHI psychologist who evaluated Petitioner, testified in the habeas proceeding that, when he conducted his evaluation, he had no information from Petitioner's 1972 murder trial that Petitioner might suffer from a Borderline Personality Disorder. H.T. 122. He had no information about the current offense other than what he received from the prosecutor. H.T. 151-52. After learning of Petitioner's history and his conduct after his arrest in this case, the psychologist did not take issue in the habeas proceeding with another expert's diagnosis that Petitioner suffered from Borderline Personality Disorder, and agreed that a person with Borderline Personality Disorder can slip into a psychotic state when under stress. H.T. 129-39, 140.

The consequence of these falsehoods was a sentencing hearing where the prosecutor exercised free rein to paint Petitioner as "a depraved man, not someone suffering from severe extreme emotional disturbance, a depraved man." T.T. 1981-82. The prosecutor could describe the evidence in its most inculpatory light, asserting that the killing was purely for Petitioner's "pleasure and enjoyment," id., without fear of contradiction by defense counsel or expert testimony. The jury had no context in which to evaluate Petitioner's conduct, in this offense as well as the former, as anything other than cold-blooded killings.

The prosecutor's successful withholding from the jury of all evidence of Petitioner's mental illness also deprived the jury of the context in which to evaluate Petitioner's bizarre testimony at the sentencing hearing, in which he testified that he could not remember what happened on the night of the killing and then incoherently "submit[ted] to the fact that [he was] the individual . . . that stabbed Mr. Daniel Patricks." T.T. at 1864; see H.T. 471-72, 488. Dr. Sadoff, the

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the fact that the prosecutor's egregious misconduct had a disastrous impact on the fairness of this sentencing hearing.

psychiatrist who examined Petitioner for the habeas hearing, testified that Petitioner's behavior on the stand at the sentencing hearing reflected his illness -- he fell apart under stress. H.T. at 485-497. Had the jury known of Petitioner's mental history, his testimony would have given it no confidence that Petitioner was describing what actually happened.

IV. The Prosecutor's Conduct Violated Basic Standards Governing the Legal Profession and Deprived Petitioner of Due Process of Law.

The Constitution and standards of professional ethics forbid prosecutors from winning convictions or death sentences by deception. Many years ago, in Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam), this Court held that the prosecution's knowing use of perjured testimony violated the constitutional guarantee of due process of law. "Such a contrivance by the state to procure the conviction and imprisonment of the defendant is as inconsistent with the rudimentary demands of justice as is obtaining the like result by intimidation." Id. As the Court explained in Brady v. Maryland, extending Mooney to the suppression of evidence favorable to the accused:

> The principle of Mooney v. Holohan is not punishment of society for the misdeeds of the prosecutor, but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. 373 U.S. 83, 87-88 (1963).

The same principle likewise forbids prosecutors from misrepresenting evidence, Miller v. Pate, 386 U.S. 1 (1967) (knowing misrepresentation of physical evidence violated

Due Process Clause). Prosecutorial integrity is vital to ensure that juries have the fullest opportunity to find the facts so that criminal trials remain the "main event" in the criminal process. Within our system of justice, "[t]he State's obligation is not to convict, but to see that, so far as possible, the truth emerges." Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in the judgment).

The standards of the legal profession also recognize the special responsibilities of public prosecutors to seek justice. Tennessee Supreme Court, Rule 8, Code of Professional Responsibility, EC-7-13 ("the public prosecutor's duty is to seek justice, not merely to convict"); State v. Spurlock, 874 S.W. 2d 602 (Tenn.Crim. App. 1993); American Bar Association, Standards for Criminal Justice: The Prosecution Function, 3-12(c) (3d ed. 1993) (same); National District Attorney's Association, National Prosecution Standards, 1.1 (2d ed. 1991) ("the primary responsibility of prosecution is to see that justice is accomplished").

The pursuit of justice is incompatible with deception. Prosecutors may not conceal facts or knowingly fail to disclose what the law requires them to reveal. Tennessee Code of Professional Responsibility, DR 7-102(A). Prosecutors should be candid with opposing counsel, National Prosecution Standards, 6.5.a, and may not "impede opposing counsel's investigation of the case." Id. 53.5.a. Nor may a prosecutor (or any lawyer) legitimately deceive third parties. Proposed Tennessee Rule of Professional Conduct 4.1(a) (Dec.1, 2001) & Comment [1]; American Bar Association, Model Code of Professional Responsibility DR 7-102(A)(5) (lawyer shall not make false statement of law or fact). Nowhere in our legal system is strict adherence to these principles more vital than in cases in which the State seeks the death penalty.

Prosecutorial misconduct such as that in this case requires reversal if there is "any reasonable likelihood [that the misconduct could] have affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 154 (1971). See also Kyles v. Whitley, 514 U.S. 419, 433 (1995). The record of this case shows that the prosecutor engaged in a pattern of deception that deprived Petitioner, and ultimately the jury, of information that would have fundamentally altered the calculus in the sentencing phase of Petitioner's trial.[11]

Together, Amici have many years of experience as prosecutors and have tried or supervised countless criminal cases, including those in which the death penalty was sought. In the judgment of Amici, the consequences of the prosecutor's withholding and distorting of evidence in this case were significant enough to have affected the judgment of the jury. Combined, the impact of the prosecutor's distortions fundamentally changed the character of the trial. Kyles, 514 U.S. 419. It would be a serious miscarriage of justice for Petitioner to be executed without any federal review of the prosecutor's conduct and its impact on the fairness of Petitioner's trial and sentencing.

CONCLUSION

For the foregoing reasons, Amici Curiae urge this Court to reverse the judgment of the United States Court of Appeals for the Sixth Circuit and remand the case for further proceedings.

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[11] This brief has discussed the prosecutor's misconduct in three aspects of the case: the issue of who was the stabber; the aggravating circumstance of the prior homicide; and Petitioner's mental condition. Other claims of prosecutorial misconduct in the habeas petition further demonstrate a pattern of misconduct and deception.

Dated: July 10, 2002

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IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MASSACHUSETTS, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly held, consistent with 28 U.S.C. § 2244 and the decisions of this Court, that a Rule 60(b) motion that seeks collateral review of a State criminal conviction, when the prisoner already has received an adjudication of a federal habeas application, constitutes a "second or successive" habeas application.

2. Whether the Sixth Circuit's decision should be affirmed on the alternative ground that it would have been an abuse of discretion for the district court to grant a Rule 60(b) motion seeking to revive a claim that the federal district court rejected as procedurally defaulted based upon a subsequent development in State procedural law that has no impact on the availability of review in State court.

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STATEMENT OF INTEREST

One of the principal objectives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and indeed of this Court's habeas corpus jurisprudence over the past 25 years, has been to reduce the incursion into State sovereignty that results when federal courts consider successive collateral attacks on a State court criminal judgment. In this case, the overarching issue is whether a State prisoner can circumvent the finality rules that Congress and this Court have adopted to limit such successive attacks by the simple expedient of a motion for relief from judgment under Federal Rule of Civil Procedure 60(b), or by analogous procedures intended to attack, directly or indirectly, the underlying State court judgment.

Although *amici curiae* take no position on petitioner's specific allegations of prosecutorial misconduct, amici have a keen interest in the proper application of AEDPA's finality requirements, which have been codified in 28 U.S.C. § 2244(b). Those requirements are designed to ensure that, absent extraordinary circumstances, States will not have to defend their criminal judgments against second or successive collateral attacks in federal court. The availability of repeated collateral attacks undermines both the finality and presumptive validity of those judgments and requires States to expend scarce societal resources.

Similarly, *amici* are keenly interested in ensuring that their State courts are afforded every reasonable opportunity to assess whether a criminal judgment is consistent with federal law before that issue is reviewed by a federal habeas court. Exhaustion of available State remedies promotes federal-State comity and is mandated by federal habeas corpus law. 28 U.S.C. § 2254(c).

If adopted by this Court, petitioner's arguments would undermine both of these interests. In so doing, those arguments would erode the significant progress reflected in

Congress's enactment of AEDPA and in the decisions of this Court on which AEDPA was built. Indeed, opponents of AEDPA have urged that Rule 60(b)—the procedural vehicle that petitioner has used in seeking to overturn his State court conviction—can and should be used to evade these statutory and judicial limitations on federal habeas petitions. See, *e.g.*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 774 (2002) (suggesting "creative use of motions under Rule 60(b)" to avoid limitations on the ability of courts to consider second and successive habeas petitions). Petitioner's own counsel has publicly stated that, if this Court rules that petitioner's Rule 60(b) motion must be entertained and adjudicated on the merits, such motions "would be[come] *the* vehicle with which to reopen" the State court criminal judgments of numerous State prisoners. *A Practitioner's-Eye View of the Court*, Legal Times, Aug. 12, 2002, at 18 (remarks of petitioner's counsel of record) (emphasis added).

STATEMENT OF FACTS

Amici agree with the statement in respondent's brief, but believe that a brief overview of the procedural history of this case in State and federal court will help to highlight the issues before the Court.

1. On February 17, 1986, petitioner and co-defendant Harold Miller entered the duplex of Patrick Daniels under the pretext of making a drug purchase. J.A. 103. Petitioner and Miller forced Daniels and his girlfriend Norma Norman to the floor. *Id.* Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes and mouth. *Id.* Petitioner stole Daniels bank card and forced Daniels to reveal his PIN number. *Id.* Petitioner then obtained a butcher knife from the kitchen "and stabbed Daniels six times in the chest." *Id.* "Prior to and during the stabbing, Daniels was crying and begging Petitioner not to hurt anyone. After

Daniels became motionless, Petitioner stabbed Norman in the back several times." *Id.* Petitioner left the knife inside Ms. Norman and fled the scene. *Id.* Daniels died as a result of his wounds; Norman survived. *Id.* at 103-04.

More than fifteen years ago, in July 1987, a Tennessee jury convicted petitioner of first-degree murder, assault with intent to commit first degree murder with bodily injury, and armed robbery. JA 102. The jury returned a death sentence on the murder charge and life sentences on each of the other convictions.

There can be no serious question of petitioner's actual guilt or his role in this crime. Petitioner's current claim of prosecutorial misconduct is predicated upon an argument that Miller, rather than petitioner, stabbed the victims. At the sentencing phase of his trial, however, petitioner repeatedly testified that the contrary was true. For example, he stated:

> "I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. . . . All I know is that I'm the man that stabbed Mr. Daniel Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman."

JA 65 (quoting Addendum I, at 1865). Elsewhere, petitioner responded to a question from counsel with the following admission:

> "Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting [sic] there, that that was true, didn't you.
>
> A. That I was the man, yes."

Id. In light of this testimony and other evidence, the jury returned a sentence of death because it found that (i) petitioner previously was convicted of second-degree murder and assault with a dangerous weapon; (ii) the murder

of Mr. Daniels was "especially heinous, atrocious or cruel"; and (iii) the murder of Mr. Daniels occurred in relation to another serious crime. *Id.* at 102-04. Against these aggravating factors, petitioner presented virtually no evidence in support of mitigation. *Id.* at 105.

On April 2, 1990, petitioner's conviction and sentence were affirmed on direct review by the Tennessee Supreme Court. 789 S.W.2d 545 (Tenn. 1990). The Tennessee Supreme Court denied petitioner's request for rehearing on May 14, 1990, and this Court denied certiorari. 498 U.S. 908 (1990).

2. In May 1993, a Tennessee trial judge conducted a three-day evidentiary hearing, and thereafter issued a memorandum opinion rejecting petitioner's request for post-conviction relief. Two years later, the Court of Criminal Appeals of Tennessee considered petitioner's claim that the prosecutor allegedly failed to provide certain exculpatory *Brady* materials during the sentencing phase, but found "no merit in the [petitioner's] claim of prosecutorial misconduct" because "[n]one of the [this] evidence was favorable to the defense." See *Jones* v. *State*, No. 01C01-9402-CR-00079, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995). The Court of Criminal Appeals rejected all of petitioner's remaining claims. See *id.*

Petitioner then filed a petition for discretionary review to the Tennessee Supreme Court. Petitioner concedes that he abandoned the "the bulk of his prosecutorial misconduct claims," Pet. Br. 25, the very claims upon which he predicates his request for relitigation in federal court. The Tennessee Supreme Court denied discretionary review seven years ago, on August 28, 1995, and this Court again denied certiorari. 516 U.S. 1122 (1996).

3. On April 23, 1996, petitioner filed a federal petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. J.A. 1. Petitioner raised numerous claims of prosecutorial misconduct, among other

claims. *Id.* at 56-60. The District Court determined that petitioner had properly exhausted two prosecutorial misconduct claims with respect to alleged *Brady* violations, *id.* at 59, 69, but concluded that there was no merit to either of these properly exhausted claims, *id.* at 69-74.

The district court further held that petitioner's remaining claims, including the prosecutorial misconduct claims at issue here, had not been exhausted before the State courts. JA 59, 69. Relying upon this Court's decision in *Gray* v. *Netherland*, 518 U.S. 152 (1996), the district court explained that federal law requires a "habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court" and "[i]f the petitioner has no remedy currently available in state court . . . the exhaustion requirement is satisfied." J.A. 50. Nevertheless, "[a]lthough a claim may be fully exhausted" in the sense that a petitioner has no remaining avenue for State court review, "the petitioner's failure to assert the claim in state court may constitute procedural default" that "bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court." *id.* at 51. As applied here, the district court determined that "petitioner had failed to exhaust" the prosecutorial misconduct claims at issue in this case because he failed to seek discretionary review of them before the Tennessee Supreme Court. *Id.* at 59. Further, the district court determined that petitioner could "no longer present those claims to the state court . . . because they would be barred by the statute of limitations." *Id.* (citing Tenn. Code Ann. § 40-30-202). As a result, the district court concluded that these claims were "procedurally defaulted." *Id.* at 60.[1] The district court, however, did grant habeas relief

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[1] The District Court catalogued petitioner's defaulted claims. *See* JA 57-58 & 57 n.8. As indicated above, prior to petitioner's seeking review from the Tennessee Supreme Court, the Tennessee Court of Criminal Appeals previously had reviewed and rejected petitioner's claims of

with respect to certain of petitioner's ineffective assistance of counsel claims and vacated his death sentence. *Id.* at 100.

On appeal to the United States Court of Appeals for the Sixth Circuit, petitioner concedes that he "did not challenge" the district court's holding that petitioner's prosecutorial misconduct claims had been procedurally defaulted. JA 155. He did, however, cross-appeal the district court's determinations regarding numerous issues. *Id.* at 123, 127.

On September 13, 2000, the Sixth Circuit vacated the district court's order granting habeas relief. JA 19. Subsequently, the Sixth Circuit granted petitioner's motion to "stay [the] mandate pending petition for writ of certiorari." *Id.* at 21. On May 21, 2001, after several extensions, petitioner filed a petition for certiorari with the Court. JA 21-22 (Petition No. 00-1742). This Court denied certiorari for a third time on October 9, 2001, as to those issues petitioner had preserved and appealed in his first habeas petition. 122 S. Ct. 386 (2001).

4. On November 2, 2001, petitioner filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure in the District Court. In his motion, petitioner sought relief from the District Court's April 8, 1998 judgment with respect to the procedurally defaulted claims of prosecutorial misconduct based upon Tennessee Supreme Court Rule 39, which was adopted June 28, 2001. JA 40. The district court determined that it lacked jurisdiction to consider the Rule 60(b) motion because it "presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court's Judgment" and therefore was a "second or successive habeas petition." *Id.* at 42.

The Sixth Circuit then denied petitioner's application for a certificate of appealability. It concluded that petitioner's Rule

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prosecutorial misconduct. See *Jones* v. *State*, No. 01C01-9402-CR-00079, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995).

60(b) motion was the equivalent of a successive habeas petition, and that petitioner had failed to meet the gateway criteria of Section 2244(b)(2). J.A. 36. The Sixth Circuit also denied petitioner's related motions to withhold mandate, grant a rehearing en banc, and remand. *Id.* at 35.

SUMMARY OF ARGUMENT

Recognizing the importance of finality of State criminal proceedings, Congress and this Court have developed standards through which to ensure that State court judgments may not be challenged, absent extraordinary circumstances, in second and successive habeas corpus petitions. See 28 U.S.C. § 2244(b); *Coleman* v. *Thompson*, 501 U.S. 722, 731-32 (1991). Similarly, Congress and this Court have adopted standards requiring habeas petitioners to exhaust claims that they might have in State court before asking a federal court to set aside a State court criminal conviction. See 28 U.S.C. § 2254(c); *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 839 (1999). Petitioner's arguments reflect a significant attack on both of these requirements which, if accepted, could seriously erode the important limitations that this Court and Congress have developed over the past 25 years.

1. Petitioner first asks the Court to sanction a procedure through which habeas petitioners may evade the finality requirements of AEDPA by labeling an effort to obtain a second adjudication of a request for federal habeas relief as something other than a habeas corpus application. That argument, if accepted, would allow petitioners to circumvent the requirements Congress adopted in Section 2244(b) to prohibit federal habeas petitioners from filing repeated federal habeas challenges to State court criminal judgments. Not surprisingly, this Court already has held that the requirements of Section 2244(b) cannot be eroded through creative labeling of what, in substance, constitutes a second adjudication of federal habeas claims. See *Calderon* v. *Thompson*, 523 U.S. 538, 547 (1998). Petitioner's contrary argument would make

a mockery of the finality requirements enacted by Congress in Section 2244(b). At a minimum, a petitioner should not be permitted to evade the requirements of Section 2244(b) by filing a Rule 60(b) motion that seeks a second adjudication, either directly or indirectly, based upon an intervening development of law or fact given that Section 2244(b) was designed specifically to limit such efforts.

2. Even if petitioner's Rule 60(b) motion were not considered a second or successive habeas application, petitioner's request that this Court permit him to relitigate his prosecutorial misconduct claim through a Rule 60(b) motion should be rejected. First, that motion is futile as a matter of law because, under the exhaustion requirement of Section 2254(c), the adoption of a State court rule that does not affect the *availability* of procedures for seeking relief is irrelevant to the question of exhaustion under federal law. In *O'Sullivan* v. *Boerckel*, this Court ruled that the exhaustion required under Section 2254(c) "turns on an inquiry into what procedures are 'available' under state law" and that "the creation of a discretionary review system does not, without more, make review in [a State supreme court] unavailable." 526 U.S. at 847-48.

Here, petitioner failed to satisfy Section 2254(c) because he was entitled to, but did not, present his claims to the Tennessee Supreme Court. The Tennessee Supreme Court's subsequent adoption of Rule 39 in no way affects that conclusion because Rule 39 does not purport to alter "what procedures are 'available' under state law." *O'Sullivan*, 526 U.S. at 847. Simply put, both before and after the enactment of Rule 39, a petitioner *could* have sought discretionary review before the Tennessee Supreme Court in precisely the same way as the petitioner whose claims this Court held were procedurally defaulted in *O'Sullivan*. Because petitioner did not, his claims were procedurally defaulted long ago and cannot be revived for federal habeas purposes by subsequent changes in State procedural law.

Second, even if petitioner's Rule 60(b) motion were not futile, granting it would nevertheless be an abuse of discretion because it would contravene the policies underlying AEDPA. In *Calderon*, this Court explained that, even in cases to which AEDPA does not apply directly, courts must exercise their discretion "in a manner consistent with the objects of [AEDPA]" and "must be guided by the general principles underlying our habeas corpus jurisprudence." 523 U.S. at 554.

Under these standards, relief is inappropriate because petitioner has failed to identify circumstances that would justify reconsideration of his prosecutorial misconduct claims. Indeed, Congress has explained that second or successive habeas corpus applications with respect to new legal issues may be considered only when there has been, unlike here, a change in constitutional law that has been made retroactive by this Court. See 28 U.S.C. § 2244(b)(2)(A). Here, the "change" in State law relied upon by petitioner bears no relation to the types of changes that Congress has deemed sufficient to justify relitigation of procedurally defaulted claims.

ARGUMENT

I. SECTION 2244(b)'S RESTRICTIONS ON "SECOND OR SUCCESSIVE" HABEAS APPLICATIONS APPLY TO PETITIONER'S RULE 60(b) MOTION AND ANY OTHER FEDERAL FILINGS THAT SEEK, DIRECTLY OR INDIRECTLY, TO OBTAIN COLLATERAL REVIEW OF A CRIMINAL CONVICTION WHERE THE PRISONER HAS ALREADY RECEIVED A FULL ADJUDICATION OF ONE FEDERAL HABEAS APPLICATION.

The core principle underlying 28 U.S.C. § 2244(b) is that, absent extraordinary circumstances, a federal habeas petitioner should have only one opportunity to adjudicate a

federal habeas challenge to a State court criminal judgment in federal court. Petitioner's efforts to circumvent this specific limitation through a general rule of civil procedure should be rejected. Specifically, as shown below, Section 2244(b) cannot be evaded based upon the label given to a filing that seeks directly or indirectly to obtain a second adjudication of a federal habeas challenge to a State court judgment. That is particularly true of a motion that seeks to litigate a matter implicated by one of the express exceptions to Section 2244(b)'s ban on second or successive applications.

A. Under AEDPA, Any Federal Court Filings That Seek, Directly Or Indirectly, A Second Adjudication Of The Right To Federal Habeas Relief Constitute "Second Or Successive Applications" Subject To AEDPA's Limitations.

The key question of statutory interpretation in this case is what constitutes a "second or successive application" within the meaning of Section 2244(b). Under the language of that provision, as correctly interpreted in *Calderon*, 523 U.S. at 552-54, and under this Court's pre-AEDPA habeas jurisprudence, a prisoner who has already received one adjudication of an application for habeas relief may not circumvent habeas finality requirements through creative labeling of federal-court filings that again seek, directly or indirectly, to overturn the prisoner's State criminal conviction. Adoption of petitioner's contrary arguments would elevate form over substance.[2]

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[2] Petitioner contends that AEDPA does not apply to his Rule 60(b) motion because it relates back to his first habeas corpus petition, which was filed before AEDPA took effect. Pet. Br. 27. But that argument merely assumes the answer to the question presented—whether his Rule 60(b) motion is properly treated as a second or successive habeas corpus application. If it is a second or successive habeas corpus application, because petitioner's Rule 60(b) motion was filed on November 2, 2001, well after the effective date of AEDPA (April 24, 1996), there can be no question that the requirements of AEDPA would apply.

1. In enacting AEDPA, "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams* v. *Taylor*, 529 U.S. 362, 386 (2000) (opinion of Stevens, J.); see also *id.* at 404 (O'Connor, J., for the Court). Congress further sought to limit "abuse of the statutory writ of habeas corpus, and to address the acute problem[] of unnecessary delay . . . in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944. As President Clinton explained, "For too long, and in too many cases, endless death row appeals have stood in the way of justice being served." President William Jefferson Clinton's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996); *accord* 142 Cong. Rec. S3465 (daily ed. Apr. 17, 1996) (statement of Sen. Warner) (stating that reform was needed to stop "the charade of habeas corpus appeals" and to preclude "death row inmates [from] drag[ging] out their appeals for several decades").

To accomplish these goals, Congress adopted restrictions on federal habeas petitioners who seek to raise claims after having previously received an adjudication of an application for federal habeas relief. 28 U.S.C. § 2244(b).

In doing so, Congress limited efforts to relitigate claims that already had been presented in a prior application as well as efforts to raise new claims. As to the former, Congress explained that a "claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *Id.* § 2244(b)(1) (emphasis added).

As to the latter, Congress provided two exceptions to the general rule of finality. First, with respect to new legal developments, Congress dictated that the adoption of a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" could be presented in a second or successive

habeas petition if that claim "was not presented in a prior application." *Id.* § 2244(b)(2).

Second, Congress also provided a limited avenue of review with respect to new factual developments bearing on actual innocence. Specifically, claims that were not presented in a prior application may be presented in a second or successive habeas corpus when (i) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and (ii) such facts, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.*

2. In determining whether a federal habeas petitioner's motion constitutes a "second or successive habeas application" under Section 2244(b), the Court has adopted a functional approach, refusing to allow State prisoners to elevate form over substance. Accordingly, a federal court is required to examine the substance of a habeas petitioner's court filing, rather than its label, to determine whether it is, in fact, a second or successive application. This approach ensures that habeas petitioners cannot, though creative labeling, "evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Calderon*, 523 U.S. at 553; see also *Slack* v. *McDaniel*, 529 U.S. 473, 486 (2000) (noting that the "phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases").

Indeed, this functional approach is necessary given the procedural gamesmanship often associated with efforts to obtain multiple adjudications of requests for federal habeas relief. Such abuses have been well catalogued by this Court. They include, for example, abandoning weaker claims either during State post-conviction proceedings or after an initial

habeas loss before a federal district court, and then attempting to revive them later if all else failed. See, *e.g.*, *McCleskey* v. *Zant*, 499 U.S. 467, 489-90 (1991). Given these experiences, Congress and this Court adopted restrictions on efforts to obtain a second bite at the federal habeas apple as a way of imposing "limits on the discretion of federal courts to grant habeas relief." *Calderon*, 523 U.S. at 555; see also, *e.g.*, *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-38 (1993); *McCleskey*, 499 U.S. at 487; *Teague* v. *Lane*, 489 U.S. 288, 308-10 (1989) (plurality); *Wainwright* v. *Sykes*, 433 U.S. 72, 90-91 (1977).

Such a functional approach is also necessary to effectuate the language and purposes of Section 2244(b). The ability to avoid the substantive impact of Section 2244(b) through mislabeling would create a massive loophole that would permit habeas corpus petitioners to mount, with impunity, two or more collateral attacks on State criminal judgments. It would, in short, allow State prisoners to control the availability of federal court proceedings based solely on the form, and not the substance, of their federal-court filings. Section 2244(b) thus reflects the broad principle that, absent exceptional circumstances, a federal habeas petitioner should not be permitted more than one opportunity to have a request for federal habeas relief adjudicated by a federal court.

The Court's analysis in *Calderon* v. *Thompson* is instructive. There, after Thompson's federal habeas petition had been denied, Thompson filed a motion to recall the mandate in the court of appeals and a Rule 60(b) motion in the district court. 523 U.S. at 546. The district court denied the Rule 60(b) motion, reasoning (correctly) that petitioner "'must not be permitted to utilize a Rule 60(b) motion to make an end-run around the requirements' of AEDPA." *Id.* at 547. The court of appeals, however, sua sponte voted to recall its prior mandate. *Id.*

This Court reversed the Ninth Circuit's decision to recall its mandate. In doing so, the Court first explained that, in

determining whether a pleading is an "application" for purposes of Section 2244(b), a "motion to recall the mandate . . . can be regarded as a second or successive application for purposes of § 2244(b)." *Id.* at 553. "Otherwise," the Court explained, "petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2)." *Id.* Although the Court ultimately determined that AEDPA did not apply because the court of appeals acted *sua sponte*, *Calderon* makes clear that any motion, pleading or other filing that seeks to relitigate old claims, or present new claims after a first federal habeas application already has been adjudicated, is subject to the requirements of Section 2244(b) regardless of the label adopted by the petitioner.

3. This Court's decisions in *Slack* v. *McDaniel*, 529 U.S. 473 (2000), and *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998), bolster the conclusion that any effort in federal court to attack collaterally a prisoner's conviction constitutes a "second or successive application" where the prisoner has already had one complete round of federal habeas review. In those cases, because the federal district court dismissed a federal habeas petition without prejudice to allow exhaustion or further development of claims in State court, there was never a first adjudication of the federal habeas claims. Indeed, those decisions "contemplated that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U.S. at 486; *Stewart*, 523 U.S. at 644. It follows that where, by contrast, a federal district court has already adjudicated a petitioner's initial habeas petition, the prisoner's subsequent effort to overturn his conviction, whether direct or indirect, and regardless of how it is labeled, constitutes a second or successive petition that must satisfy the requirements of Section 2244(b).

4. This principle is dispositive here. It is undisputed that the petitioner is seeking to overturn his State criminal

judgment through the vehicle of his Rule 60(b) motion. Specifically, petitioner seeks to overturn the district court's prior determination that his "prosecutorial misconduct" claims were procedurally defaulted, so that he can then have those claims addressed "on the merits." For reasons explained above, the fact that he is not immediately seeking to have those claims resolved on the substantive merits does not diminish the fact that he is using a federal procedural device to attack collaterally the State court judgment against him. Thus, his 60(b) motion clearly constitutes an "application" for federal habeas relief.

Petitioner's Rule 60(b) motion also constitutes a "second or successive" application within the meaning of Section 2244(b) because he has already received one complete adjudication of a request for federal habeas relief. That adjudication did not reach the substantive merits of certain of petitioner's prosecutorial misconduct claims, but only because the district court found that petitioner had procedurally defaulted them. There can be no serious question that a determination of procedural default constitutes an "adjudication" of a federal habeas claim. As this Court explained in *McCleskey* v. *Zant*, 499 U.S. 467 (1991), "[t]he prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding." *Id.* at 490. Similarly, *Coleman* v. *Thompson*, 501 U.S. 722 (1991) held that, "in all cases in which a state prisoner has defaulted his federal claims in state court . . . federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Id.* at 750.

In short, petitioner has already received one full adjudication of a federal habeas application. The decision petitioner received from the district court on his earlier habeas

application concluded that his properly preserved prosecutorial misconduct claims did not entitle him to relief and the remainder were procedurally defaulted. There can thus be no question that the district court's decision was an adjudication that makes his subsequent Rule 60(b) motion a "second or successive" application within the meaning of the statute. A contrary conclusion in this case would effectively allow any habeas petitioner to avoid the statutory restriction simply by calling his request for relief from a State court conviction a Rule 60(b) motion rather than an application for habeas corpus.

B. A Rule 60(b) Motion Seeking A Second Adjudication Of A Request For Federal Habeas Relief Predicated On A Change In The Law Or New Facts Constitutes A "Second Or Successive Application" Subject To The Limitations Of Section 2244(b).

At a minimum, a Rule 60(b) motion based on new law or facts as to the underlying State court adjudication should be considered a second or successive petition subject to the limitations of Section 2244(b).

1. As noted above, Section 2244(b)(2)(A) permits review, in a second or successive application, of new claims based upon intervening developments of federal constitutional law to which this Court has given retroactive application. These intervening developments have been determined by Congress to permit a federal habeas petitioner to raise a new claim in a second or successive habeas application. Under the principle of *expressio unius, exclusio alterius*, Congress's recognition of certain legal developments as warranting consideration in a second or successive application presupposes that other legal developments—including those based on changes or clarifications of State law—do not merit similar treatment. See, *e.g.*, *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86-87 (1994) (Congress's creation of special federal rules to govern various issues in connection with litigation against those

associated with failed S&Ls was a clear indication that Congress did not intend a federal rule with respect to other matters arising in that litigation).

Indeed, it would make no sense to allow claims that Congress expressly permitted to be considered in a second or successive petition to be treated equally to those Congress that omitted. For example, Congress's determination that only claims based upon new rules of constitutional law recognized and made retroactive by this Court can be considered in a second or successive habeas petition would be undermined if a habeas petitioner could use a Rule 60(b) motion to seek habeas relief based on a new rule this Court determined would not merit retroactive application on collateral review. The same is true of, for example, a "new rule of constitutional law" recognized by an intermediate State appellate court, but not by this Court.

Similarly, Section 2244(b)(2)(B) carves out a category of factual claims—newly discovered facts bearing on actual innocence—of sufficient magnitude to be permitted late entry into a federal habeas court even though they were not raised in the initial application. Here as well, Congress's recognition of certain factual claims as warranting belated consideration presupposes that other post-decision factual claims do not merit similar treatment. And it would make no sense for factual developments that Congress believed to warrant a second bite at the federal habeas corpus apple be treated equally with other factual developments that Congress did not believe required similar treatment.

For all these reasons, a Rule 60(b) motion for relief from judgment based on an intervening State law development cannot be permitted to evade Congress's determination that such legal developments do not warrant a second adjudication of a federal habeas petitioner's challenge to a State court judgment.

2. Here, it is undisputed that petitioner's Rule 60(b) motion seeks relief based on a recent legal development with respect to a State court rule of appellate procedure. This State law development plainly is not "a new rule of constitutional law . . . by the Supreme Court." It is, rather, a procedural rule newly promulgated by the Tennessee Supreme Court. Indeed, according to petitioner's characterization, it is not even a "new rule" at all, but rather a "clarification" of an existing rule. Pet. Br. 6, 35. But there is no disputing that the promulgation of Rule 39 is the "new" legal development on which petitioner's Rule 60(b) motion rests.

In short, the petitioner's Rule 60(b) motion seeks to attack collaterally the petitioner's State criminal judgment, it must be treated as an "application" for habeas relief under the statute. And because that motion seeks relief based on a type of legal development that is not contemplated by the statute, it must be treated as a "second or successive" application and therefore governed by the restrictions in Section 2244(b). To hold otherwise would not only contravene AEDPA's language and history, it would undermine Congress's carefully crafted restrictions on multiple habeas applications.

II. EVEN IF NOT CONSIDERED A HABEAS APPLICATION, PETITIONER'S RULE 60(b) MOTION MUST BE DENIED, BOTH BECAUSE IT IS LEGALLY FUTILE AND BECAUSE GRANTING RULE 60(b) RELIEF WOULD CONTRAVENE THE POLICIES UNDERLYING AEDPA.

Even if this Court were to hold that petitioner's Rule 60(b) motion was not a second or successive application, the Sixth Circuit's judgment should be affirmed because granting petitioner's Rule 60(b) motion would have been a clear abuse of discretion. That is because (i) petitioner's application is futile as a matter of law under other provisions of AEDPA and this Court's decision in *O'Sullivan*, and (ii) granting the motion would contravene the policies underlying AEDPA.

A. Petitioner's Motion Is Futile Because, Under AEDPA And This Court's Decision In *O'Sullivan*, New State Court Rules Or Declarations That Do Not Affect The Availability Of A State Court Procedure Have No Bearing On Whether A Claim Has Properly Been Exhausted For Purposes Of Federal Habeas Law.

The heart of petitioner's Rule 60(b) motion is that the promulgation of Tennessee's Rule 39 is a sufficient basis for reopening the district court's earlier finding of procedural default. And the largely unexamined premise of that argument is that, if the procedural default question were to be answered anew, Rule 39 might produce a different outcome.

This premise should be assessed with care because, upon closer examination, it is clear that this argument is contrary to the reasoning in *O'Sullivan* and, if accepted, would have a potentially broad impact nationwide. Indeed, a number of States now have rules or policies similar to Rule 39,[3] and

[3] In addition to Tennessee, courts in at least four States have indicated that although State discretionary review is available, it need not be utilized for a prisoner to be deemed to have exhausted State court remedies. *See State* v. *Sandon*, 777 P.2d 220, 221 (Ariz. 1989) (concluding that defendants need not petition for discretionary review before Arizona Supreme Court to exhaust State remedies); Ark. Sup. Ct. R. 1-2(h) (stating that, in criminal appeals or post-conviction relief matters, "appellant shall not be required to petition for . . . review in the Supreme Court following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error"); *In re: Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1, (Pa. May 9, 2000) (per curiam) (declaring "that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error"); *State* v. *McKennedy*, 559 S.E.2d 850, 854 (S.C. 2002) (holding that in criminal and post-conviction appeals, "petitions for . . . certiorari following an adverse Court of

other State supreme courts could well adopt such rules in the future. As shown below, State court rules such as Tennessee's Rule 39 are irrelevant to the questions of exhaustion and procedural default as a matter of federal law when they do not affect the "availability" of discretionary appellate review under State law.

1. There can be no serious question that the district court's original finding of procedural default was correct at the time it was made. Indeed, this Court's subsequent decision in *O'Sullivan* v. *Boerkel*, 526 U.S. 838 (1999), confirms this conclusion.

In *O'Sullivan*, this Court addressed the question of "whether a prisoner must seek review in a state court of last resort when that court has discretionary control over its docket" in order "to satisfy the federal exhaustion requirement." *Id.* at 843. The Court began its analysis by examining the statutory language of the exhaustion requirement: "Section 2254(c) provides that a habeas petitioner 'shall not be deemed to have exhausted the remedies available in the court of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.'" *Id.* at 844 (omission in original). Interpreting this language, the *O'Sullivan* Court held that a prisoner properly exhausts his claims when he resorts to the normal measures that constitute "one complete round of the State's established appellate review process." *Id.* at 845. Thus, where State procedure gives prisoners "'the right . . . to raise' their claims through a petition for discretionary review in the State's highest court," the prisoner must include claims in such a petition before presenting them in a federal habeas proceeding. *Id.* (omission in original).

Under *O'Sullivan*, petitioner plainly failed to exhaust his claims of prosecutorial misconduct. During State post-

Appeals' decision are not required in order to exhaust all available state remedies").

conviction relief proceedings, petitioner did present those claims to the State trial court and court of criminal appeals. The courts both rejected his claims. Petitioner then had a right to seek review of those claims in the Tennessee Supreme Court. Petitioner, however, abandoned many (but not all) of his prosecutorial misconduct claims when he petitioned that court for review. J.A. 36. Under *O'Sullivan*, therefore, the federal district court was correct in concluding that petitioner's claims were procedurally defaulted because he did not exhaust them in State court.

2. Tennessee Rule 39 does not affect this conclusion.[4] As noted above, *O'Sullivan* was predicated upon the language of 28 U.S.C. § 2254(c), which states that a habeas "applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, *by any available procedure*, the question presented." *Id.* (emphasis added). The *O'Sullivan* Court held that federal habeas petitioners must properly exhaust their claims by applying for discretionary State high court relief where such relief is a normal part of the appellate process. See 526 U.S. at 845 (noting discretionary review was part of "Illinois' established,

[4] That provision, which was adopted three years after the district court concluded that petitioner procedurally defaulted the prosecutorial misconduct claims he raises here, states:

> "In all appeals from criminal convictions on post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. . . . On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review."

J.A. 278-79.

normal appellate review procedure" and was "a normal, simple, and established part of the State's appellate review process" (emphasis added)). Thus, this Court ruled that "any available procedure" in Section 2254(c) means any remedy that is part of the normal appellate process and that the normal appellate process includes petitioning for discretionary appellate review when available. *Id.* at 844-47.

In so holding, this Court expressly rejected the argument that requiring discretionary review for exhaustion purposes may have the unwanted consequence of encouraging petitions to State supreme courts for discretionary review. See *id.* at 845-47. The Court acknowledged that a requirement that prisoners present claims in petitions for discretionary appellate relief "has the potential to increase the number of filings in state supreme courts," and "that this increased burden may be unwelcome in some state courts because the courts do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court." *Id.* at 847. Nonetheless, the Court held that a prisoner, to properly exhaust a claim and avoid procedural default, must still present that claim in all normal State appellate proceedings:

> Section 2254(c) . . . directs federal courts to consider whether a habeas petitioner has "the right *under the law of the State to raise, by any available procedure*," the question presented. . . . The exhaustion doctrine, in other words, turns on an inquiry into what procedures are "available" under State law.

Id. at 847-48. Thus, as long as a procedural remedy such as discretionary review remains available, the federal statutory exhaustion provision requires that a habeas petitioner avail himself of that remedy before bringing his claims in federal court.

In response to *O'Sullivan*, the Tennessee Supreme Court did not alter its procedures for seeking discretionary review.

The Tennessee Supreme Court left Rule 11—which provides the standards governing the grant of discretionary review—unchanged. Indeed, the advisory committee for the Tennessee Rules explained that (i) "The Tennessee Supreme Court adopted Rule 39 in response to *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999)," but (ii) "Rule 39, Rules of the Tennessee Supreme Court, . . . *works no change* to Tenn.R.App.P. 11 itself." Tenn. R. App. Proc. 11, 1999 Ad. Comm'n Cmt. (emphasis added); see Tenn. R. App. P. 11(a).[5]

Instead of making relief unavailable, as both Section 2254(c) and *O'Sullivan* require, the Tennessee Supreme Court in Rule 39 simply declared exhausted all claims that were not presented for discretionary review. The Tennessee Supreme

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[5] Tennessee's procedures governing the availability of discretionary review are virtually identical to those of Illinois, which were at issue in *O'Sullivan*. *See* 526 U.S. at 843 (explaining that appeals from the intermediate appellate court are granted as "'a matter of sound judicial discretion'" and setting forth similar factors that "'indicate the character'" of those considered in exercising discretion). Nor is discretionary review of claims presented in a Rule 11 petition only "occasionally employed" in "truly extraordinary cases." *Id.* at 850 (Souter, J., concurring). Recent statistics indicate that approximately 7% to 10% of requests for discretionary review are granted by the Tennessee Supreme Court. *See Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 1999-2000*, at 9 (2000) (reporting that review was granted in 83 cases and denied in 714 cases (10.4% granted)); *Annual Report of the Tennessee Judiciary, Statewide Appellate and State Trial Court Statistics, FY 2000-01*, at 39 (2001) (reporting that review was granted in 69 cases and denied in 878 cases (7.3% granted)). Thus, discretionary review before the Tennessee Supreme Court appears to be even more "available" than such review was before the Illinois Supreme Court at the time this Court decided *O'Sullivan*. *See* Resp. Br. at *6 n.2, *O'Sullivan* v. *Boerckel*, No. 97-2048 (U.S. filed Jan. 28, 1999), *available at* 1999 WL 61669 (noting that the Illinois Supreme Court grants review in approximately 3% of cases); Tr. Oral Arg. at *25, *O'Sullivan*, 97-2048 (U.S. argued Mar. 30, 1999), *available at* 1999 WL 200680 (same).

Court's adoption of Rule 39 cannot change the requirements of federal law as construed by this Court in *O'Sullivan*.[6]

B. Reopening The District Court's Prior Conclusion Of Procedural Default Would Contravene The Policies Underlying AEDPA And This Court's Habeas Jurisprudence.

Even if petitioner's Rule 60(b) motion were not futile as a matter of law under Section 2254(c) and *O'Sullivan*, granting that motion would be a plain abuse of discretion because it would contravene the policies underlying both AEDPA and this Court's habeas jurisprudence. In the closely analogous context presented in *Calderon*, this Court directed that a district court's discretion to reopen habeas proceedings must be exercised "in a manner consistent with the objects of [AEDPA]" and "must be guided by the general principles underlying [this Court's] habeas corpus jurisprudence." 523 U.S. at 554. Indeed, in *Calderon*, although this Court concluded that AEDPA did not apply directly to a court of appeals' decision to recall its mandate sua sponte, the Court concluded that AEDPA's provisions and underlying policies

[6] In fact, Rule 39 goes well beyond an attempt, in effect, to overturn *O'Sullivan*, which dealt with the availability of remedies subject to discretionary review. It also runs contrary to the broader exhaustion requirement first announced in *Ex parte Royal*, 117 U.S. 241 (1886), which also requires a defendant to exhaust any claims he may have through remedies available as a matter of right on direct review in the State court system. Rule 39's pronouncement of exhaustion is not restricted to claims that were not presented for discretionary review. Rule 39 also deems exhausted claims that a criminal defendant has an absolute right to have reviewed on the merits by the Tennessee Supreme Court. According to Rule 39, "[o]n automatic [direct] review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review." J.A. 279. None of the opinions in *O'Sullivan* supports the view that Rule 39 may declare exhausted, as a matter of federal law, claims which a habeas petitioner never challenged on direct review which is available as a matter of right.

"'certainly inform [this Court's] consideration' of whether the Court of Appeals abused its discretion." *Id.* at 558 (quoting *Felker* v. *Turpin*, 518 U.S. 651, 663 (1996)).

Elsewhere, this Court has noted that the limitations imposed upon federal habeas proceedings reflect a proper respect for the interests of "comity, finality and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). As shown below, granting a motion such as petitioner's Rule 60(b) application would contravene these interests, as well as Congress's specific judgments as to the circumstances in which new legal developments and newly discovered facts may be a basis for a second collateral attack on a State criminal judgment.

1. There can be no doubt that granting the kind of relief petitioner seeks under the guise of Rule 60(b) would undermine "the respect that federal courts owe the States and the States' procedural rules." *Coleman*, 501 U.S. at 726. As this Court has noted, as a general matter, "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Calderon*, 523 U.S. at 555-56 (internal quotations omitted). Accordingly, this Court has explained that the federal habeas power must be invoked sparingly to "preserve the federal balance" and to give a proper respect "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (internal quotation omitted).

Concerns regarding "comity," moreover, are not "limited to the judicial branch of a state government." *Id.* at 552. Federal habeas courts must not unduly "frustrate the interests of a State . . . in enforcing a final judgment" by unduly interfering with the State's legislative and executive branches. *Id.*

Here, in furtherance of comity, Congress has already given States a means to waive the exhaustion requirement.

Specifically, Congress provided that States may waive an exhaustion defense at the option of their *executive* officials appearing in court: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). This express congressional allocation of the waiver power should not be supplanted by a new rule effectively permitting State supreme courts to engage, intentionally or not, in wholesale waiver of the federal requirement that habeas petitioners exhaust all "available" State court remedies.

2. As this Court has noted, the exhaustion doctrine is also informed by federalism concerns. *Williams*, 529 U.S. at 436. In Section 2254(c), Congress has provided a rule of law that, in its judgment, strikes the proper federal-State balance. As explained above, that rule provides that a habeas petitioner must exhaust all remedies normally "available" in State court. 28 U.S.C. § 2254(c).

This rule not only embodies a judgment that State prisoners should respect State court error-correction processes, but it also helps ensure that State courts have a full opportunity to confront all claims of federal constitutional error in their criminal trials before the scarce resources of the federal judiciary are called upon to correct any remaining error. Allowing petitioner, or others like him, to reopen prior findings of procedural default on the basis of provisions such as Rule 39 would disserve these policies.

3. Except in unusual circumstances, moreover, successive collateral attacks on State criminal judgments undermine the federal courts' "enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system." *Calderon*, 523 U.S. at 555 (internal quotation omitted). Finality "is essential to both the retributive and the deterrent functions of criminal law," *id.*, for "[n]either innocence nor just punishment can be

vindicated until the final judgment is known." *McCleskey*, 499 U.S. at 491. Moreover, "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309.

Obviously, granting petitioner's Rule 60(b) motion would undermine the finality of his own criminal judgment. It would also cast doubt on the finality of many other State criminal convictions around the country. Indeed, if this Court were to adopt petitioner's position, the Illinois Supreme Court would be free to make a pronouncement similar to that in Rule 39 and thereby permit the habeas petitioner in *O'Sullivan* to file a Rule 60(b) motion for the very relief that this Court previously denied. Such a revival of stale claims in Rule 60(b) motions threatens to overwhelm the resources, not only of the lower federal courts, but also the State attorneys who would have to oppose those motions.[7]

4. In this case, moreover, granting petitioner's Rule 60(b) motion would effectively allow the petitioner to flout Congress's judgment that, once a prisoner has had one full

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[7] Even if this Court were to permit Tennessee Supreme Court Rule 39 to control the federal exhaustion inquiry in cases arising from Tennessee, Rule 39 should be given only prospective effect. First, the Tennessee Supreme Court lacks any interest in the retroactive application of Rule 39. As that court explained, Rule 39 seeks to discourage the "routin[e] petition[ing] . . . for permission to appeal . . . in order to exhaust all available state remedies for purposes of federal habeas corpus litigation." J.A. 278. Rule 39, however, advances this interest only insofar as it operates to curtail future petitioning for discretionary review.

Second, retrospective application of Rule 39 could have grave consequences for the States and the federal district courts. Such a ruling would permit all habeas claims since 1967 that were held procedurally defaulted for failure to exhaust in a petition for discretionary review to be the subject of Rule 60(b) motions for reconsideration based on any post-1967 legal development. The effects would be particularly acute in States such as South Carolina and Arizona, whose supreme courts have taken positions similar to that of Tennessee, *see O'Sullivan*, 526 U.S. at 847, and all other States whose supreme courts may opine similarly in the future. *See, supra*, n.3.

adjudication of a habeas application, the only legal developments that can provide a basis for relief from the State criminal judgment are new rules of constitutional law adopted (and made retroactive) by this Court. Here, as noted above, Section 2244(b) specifies that the only change in law that might permit a petitioner a second adjudication of a request for federal habeas relief is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). Yet here, the only purported change in the law was the Tennessee Supreme Court's adoption of a Rule 39, a procedural provision that petitioner contends "clarified" existing Tennessee procedural law. Pet. Br. 9. Under *Calderon*, adoption of Rule 39 is not an appropriate basis for granting petitioner's Rule 60(b) motion because it plainly is not a pronouncement by this Court of "a new rule of constitutional law."

* * * * *

In sum, to grant a Rule 60(b) motion on the basis of Rule 39 would be both futile under Section 2254(c) and contrary to the purposes underlying AEDPA and this Court's habeas jurisprudence. Granting such a motion would, therefore, be a plain abuse of discretion. The judgment below can be affirmed on that ground even if the Court were to conclude that petitioner's Rule 60(b) motion does not constitute a "second or successive application" within the meaning of Section 2244(b).

CONCLUSION

For these reasons and those in respondent's brief, the judgment of the Sixth Circuit should be affirmed.

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IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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31 pp

QUESTIONS PRESENTED

1. Does Rule 60(b) of the Federal Rules of Civil Procedure apply to a case where the petitioner seeks to relitigate in the District Court an issue decided against him by that court, in the absence of any fraud on the court or fundamental miscarriage of justice?

2. Does the successive petition rule apply to an issue previously decided against the petitioner on the ground of procedural default?

3. Can Rule 60(b) be used to revive an issue of law decided against the petitioner in District Court and intentionally omitted from his appeal?

4. Does a Court of Appeals abuse its discretion by refusing to consider a claim intentionally omitted from the appeal and raised for the first time in that court on petition for rehearing, in a habeas case involving no question of guilt of the offense?

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IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attempt to evade Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On February 17, 1986, over 16 years ago, James Lee Jones and Harold Devalle Miller murdered Patrick Daniels and attempted to murder Norma Norman. *Abdur'Rahman* v. *Bell*, 226 F. 3d 696, 699 (CA6 2000). Jones is the petitioner in the present case, now known as Abu-Ali Abdur'Rahman. See *id.*, at 698, n. 1.

> "Petitioner, armed with a shotgun, and Miller, armed with an unloaded pistol, entered the duplex under the pretext of making a drug purchase. Petitioner and Miller displayed their firearms and forced Daniels and his girlfriend, Norma Norman, to the floor. Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes, and mouth. After stealing Daniels's bank card, Petitioner forced Daniels to reveal his PIN number. Petitioner also searched the house and found some marijuana in some sofa cushions." *Id.*, at 699.

Petitioner disputes whether he or Miller actually stabbed the victims. Mr. Daniels was stabbed six times in the chest, while begging for his life. *Ibid.* Ms. Norman was stabbed several times in the back, but miraculously survived. *Ibid.* She is not able to tell us which of the intruders did the stabbing, because petitioner, not Miller, taped her eyes shut. See *ibid.* We do know that petitioner personally did the binding and blindfolding that rendered the victims helpless to be slaughtered. See *ibid.* We also know that petitioner placed his gun barrel squarely between Ms. Norman's eyes. *State* v. *Jones*, 789 S. W. 2d 545, 551 (Tenn. 1990). In short, we know to a certainty that Jones/Abdur'Rahman was not just a minor accomplice along

the lines of Sandra Lockett. Cf. *Lockett* v. *Ohio*, 438 U. S. 586, 597 (1978) (plurality opinion).

During the penalty phase, petitioner testified that he stabbed both victims. *Abdur'Rahman* v. *Bell*, 999 F. Supp. 1073, 1086 (MD Tenn. 1998).

The conviction and sentence were affirmed on appeal. *State* v. *Jones*, 789 S. W. 2d 545 (1990). Among the claims rejected was a prosecutor misconduct claim regarding inadmissible evidence in the penalty phase of the circumstances of and sentence for Jones' previous murder. See *id.*, at 551-552. This did not amount to reversible error, given that the fact of the prior murder was admissible and undisputed. See *id.*, at 552.

Jones then applied for state post-conviction relief. The trial court denied the petition, and the Court of Criminal Appeals affirmed. *Jones* v. *State*, No. 01C01-9402-CR-00079, 1995 Tenn. Crim. App. LEXIS 140 (Feb. 23, 1995). Among the claims rejected on the merits by that court was a claim that the prosecution failed to disclose certain evidence as required by *Brady* v. *Maryland*, 373 U. S. 83 (1963). See *id.*, at *7.

Petitioner then requested leave to appeal to the Tennessee Supreme Court, see 999 F. Supp., at 1078, a form of discretionary review. See *id.*, at 1080. Sixth Circuit precedent in effect at the time had established that omission of a claim from such a petition constitutes a failure to exhaust the claim, leading to default of the claim. See *Silverburg* v. *Evitts*, 993 F. 2d 124, 126 (CA6 1993). Petitioner omitted some of the misconduct claims from the petition. See 999 F. Supp., at 1082.

Petitioner filed a federal habeas petition. The District Court granted summary judgment for respondent on the misconduct claim regarding evidence of the prior murder. See *id.*, at 1079. It also rejected two other *Brady* claims on the merits, finding that mental health records were not material and that lab reports

had, in fact, been given to the defense. *Id.*, at 1089-1090.[2] The District Court denied the misconduct claims not presented to the Tennessee Supreme Court as defaulted. *Id.*, at 1087. The District Court granted relief on the penalty, finding ineffective assistance of counsel. *Id.*, at 1102. The state appealed the latter holding, and petitioner appealed on instruction and guilt-phase issues. See 226 F. 3d, at 700, 709, 711, 713. Petitioner did not appeal the prosecutor misconduct issue. See J. A. 155. The Court of Appeals reversed on the ineffective assistance issue and otherwise affirmed. 226 F. 3d, at 715. This Court denied certiorari. *Abdur'Rahman* v. *Bell*, 534 U. S. __, 151 L. Ed. 2d 295, 122 S. Ct. 386 (2001).

While the certiorari petition was pending, the Tennessee Supreme Court promulgated Rule 39. In response to a suggestion in *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 847 (1999), the new rule states that a petition for discretionary review "shall not be required . . . in order to be deemed to have exhausted all available state remedies . . . ." The state disputes whether this rule reaches back to retroactively cure a claim previously defaulted under the rules of *Silverburg* and *O'Sullivan*. See J. A. 271-273.

Over three months after promulgation of the rule, and following this Court's denial of certiorari, petitioner moved for rehearing in the Court of Appeals and also moved for relief from judgment in the District Court under Rule 60(b) of the Federal Rules of Civil Procedure. See J. A. 152, 158. The District Court treated the motion as a successive habeas petition and transferred the case to the Court of Appeals. J. A. 40-42. The Court of Appeals denied both the petition for rehearing and the motion for leave to file a successive habeas petition. J. A. 39.

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2. Petitioner's extended discussion about the splattering of blood, see Brief for Petitioner 10-19, must be read in light of the fact that the lab report showing no blood on his coat had, in fact, been disclosed to the defense.

SUMMARY OF ARGUMENT

The Federal Rules of Civil Procedure do not apply to habeas corpus when their application would be contrary to the statutes or rules specifically governing habeas, or when they are unsuited to the specialized needs of this unique procedure. In particular, Rule 60(b) cannot be used to evade the successive petition rule. Congress has decided when a second round of habeas litigation may be commenced and has established special procedural safeguards for quickly determining which cases qualify for a second round. The purpose of this reform is not to reduce the number of petitions *granted* on a second round, which was never the problem, but to *preclude* the second round and its delay altogether. Broad consideration of Rule 60(b) motions would defeat the purpose of the statute.

The successive petition rule applies to claims denied in the first round on the basis of procedural default, in addition to those denied on the "merits" in the narrow sense. The rule is a modified rule of res judicata. Under the rule of *Angel* v. *Bullington*, any final decision that relief cannot be granted on the claim is a decision on the "merits" for res judicata purposes. Cases involving dismissals without prejudice, rendered in the expectation that the claim can be considered in the future, are inapposite.

Even in an ordinary civil case, Rule 60(b) cannot be used to revive an issue intentionally omitted from the appeal. Petitioner could have appealed the District Court's decision on the default issue to the Court of Appeals and chose not to. Under *Ackermann* v. *United States*, Rule 60(b) is not available to revive the claim.

The Court of Appeals was well within its discretion to refuse to consider a claim raised for the first time in that court on petition for rehearing. There is no miscarriage of justice in this case that would warrant a departure from normal procedure. Petitioner is guilty of murder. He was an active participant, not a minor accomplice, regardless of which version of the facts is

believed. He has murdered before. Justice is long overdue in this case.

ARGUMENT

I. FRCP 60(b) does not apply to habeas cases where its effect is to evade the successive petition statute.

Petitioner's statement of the first question presented in this case is whether "every Rule 60(b) Motion constitutes a prohibited 'second or successive' habeas petition as a matter of law." Brief for Petitioner i. No such stark rule is necessary to decide this case. There may be extreme circumstances not presented in this case that would call for a different result. Cf. *Calderon* v. *Thompson*, 523 U. S. 538, 557 (1998) (noting that fraud on the court might be different); *Thompson* v. *Calderon*, 151 F. 3d 918, 920, n. 3 (CA9 1998) (later proceedings in same case, noting that prosecution misconduct depriving petitioner of evidence to make the § 2244(b)(2) showing might be a ground for Rule 60(b) relief). Instead, the case can be decided on the well-established principle that the Federal Rules of Civil Procedure[3] do not apply where application would be contrary to the habeas rules or statutes or the specialized needs of habeas proceedings. In particular, Rule 60(b) cannot be used to evade the successive petition rule. The overwhelming majority of the Courts of Appeals have so held. See *Dunlap* v. *Litscher*, No. 02-1960 (CA7, Sept. 6, 2002), p. 3 (collecting cases).

A. Habeas Corpus and the Civil Rules.

Although habeas corpus is nominally a civil proceeding, that label is "gross and inexact." *Harris* v. *Nelson*, 394 U. S. 286, 293-294 (1969). "Essentially, the proceeding is unique."

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3. For brevity, we will refer to these rules as the "Civil Rules" and the Rules Governing Section 2254 Cases in the United States District Courts as the "Habeas Rules."

Id., at 294. As originally promulgated, the Civil Rules had "very limited application to habeas proceedings." *Id.*, at 295. Civil Rule 81(a)(2) simply continued the application of civil rules to habeas proceedings to the extent they had been applied before the promulgation of the rules, but not further. *Id.*, at 294. To the extent the Civil Rules introduced procedural innovations, such as broad discovery, they did not apply to habeas. See *id.*, at 295. The *Harris* Court also noted "the unsuitability of applying to habeas corpus provisions which were drafted without reference to its peculiar problems." *Id.*, at 296. Discovery as it exists in federal civil litigation was unsuited, because it would "do violence to the efficient and effective administration of the Great Writ." *Id.*, at 297. Habeas Rule 11 is "intended to conform with the Supreme Court's approach in the *Harris* case." Advisory Committee's Notes on Habeas Rule 11, 28 U. S. C., p. 479 (2000 ed.).

Harris was applied specifically to Rule 60(b) in *Pitchess* v. *Davis*, 421 U. S. 482 (1975) (*per curiam*). A habeas petitioner successfully obtained a new trial, but then sought to preclude a retrial. He asked the Federal District Court to change its judgment from a conditional to an unconditional writ. *Id.*, at 484-485. Under the circumstances, the basis of this claim could not be exhausted in state court until the post-trial appeal. See *id.*, at 488. The Court held that Rule 60(b) could not be used to evade the exhaustion rule. Civil Rule 81(a)(2) precluded use of the Civil Rules in a manner contrary to the habeas statutes. "Since the exhaustion requirement is statutorily codified, even if Rule 60(b) could be read to apply to this situation it could not alter the statutory command." *Id.*, at 489.

Rule 60 "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2851, p. 227 (2d ed. 1995) (cited below as "Wright & Miller"). Rule 60 was drafted with civil litigation in mind and therefore strikes that balance in the way thought appropriate for civil litigation. Criminal cases

also raise the problem of balance between finality and error correction. The factors to be considered differ, however, and so a different rule addressing those concerns has evolved for habeas corpus. That different rule is the successive petition rule.

Taken as a whole, criminal procedure tilts the finality/justice balance sharply in the defendant's favor. For the criminal defendant, exclusively among all litigants, a favorable jury verdict is absolutely final and unreviewable. No matter how clearly erroneous, an acquittal cannot be overturned. See, *e.g.*, *United States* v. *Scott*, 437 U. S. 82, 91 (1978). Criminal defendants alone, of all litigants, can have the lower federal courts review claims that state courts erred on federal questions. The prosecution cannot and civil litigants cannot. See, *e.g.*, *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 286 (1970). Even when that review is concluded, res judicata as such does not apply to the denial of habeas relief. See *infra*, at 11.

The claim that unsuccessful habeas petitioners should be afforded relief from judgment on the same basis as civil litigants must be evaluated in this context. The entire proceeding is an additional layer of review no other litigant receives, and the judgment from which relief is sought is not res judicata.

The direct effect of a judgment denying habeas relief is merely to leave the status quo intact. There is nothing to relieve. The prisoner remains in prison under the original judgment of conviction, not the judgment denying habeas. The need for relief only arises from the indirect effects. A second petition is subject to the limits of 28 U. S. C. § 2244(b). In addition, because the statute of limitations is not tolled during the pending of the first federal petition, see *Duncan* v. *Walker*, 533 U. S. 167, 181-182 (2001), the second petition might be time-barred. Congress has considered those possibilities and made its decision as to the appropriate balance. Exceptions for newly discovered facts, see 28 U. S. C. § 2244(b)(2)(B)(i); § 2244(d)(1)(D), retroactive new rules, see § 2244(b)(2)(A) and

(d)(1)(C), state-created impediments, see § 2244(d)(1)(B), and actual innocence, see § 2244(b)(2)(B)(ii), are built into the statute where and to the extent Congress thought them appropriate.

In the *Thompson* case, both this Court and the Ninth Circuit noted possible extreme cases where the state would have no legitimate expectation of finality. A party who procured a judgment by fraud upon the court would not have a legitimate judgment, *Calderon* v. *Thompson*, 523 U. S., at 557, and hence no entitlement to the finality of a judgment. Where the petitioner cannot meet the exceptions to the statutory rule because the state's misconduct prevents him from doing so, that misconduct could conceivably estop the state from asserting the bar. See *Thompson* v. *Calderon*, 151 F. 3d, at 921, n. 3. Such rare circumstances can be addressed when and if they arise. The present case is a routine request to relitigate based on new legal authority. Nothing in petitioner's Rule 60(b) argument would confine use of the rule to any narrow subset of habeas cases. To hold that Rule 60(b) is generally applicable to habeas cases, or to the large class of cases where at least one claim was denied on the basis of default, would be to create a second, broad set of exceptions in addition to the narrow ones Congress decided upon when the issue was squarely before it. That is precisely what *Harris*, *Pitchess*, Civil Rule 81(a)(2), and Habeas Rule 11 forbid.

B. The Successive Petition Rule.

The rule on consideration of a second petition after denial of the first has evolved from unlimited allowance at common law to prohibition with only narrow exceptions under 28 U. S. C. § 2244(b). This evolution has been a response to other changes in the law of habeas corpus.

At common law, the denial of habeas relief had no preclusive effect at all, and the petitioner could apply to a different judge for *de novo* reconsideration. See *McCleskey* v. *Zant*, 499 U. S. 467, 479 (1991). This rule was needed because there was

no appellate review of the denial. See *ibid.* The rule was not a burden because of the extremely narrow scope of issues which could be considered on habeas. "As applied to criminal cases, habeas corpus was a pretrial remedy. . . . After conviction, the writ was not available to attack judgments of courts of competent jurisdiction." Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928 (1998) (footnotes omitted). The rule that denial of habeas was not res judicata presented no threat whatever to the finality of convictions, because the judgment of conviction itself *was* res judicata. See *id.*, at 930; *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203, 209 (1830).

Both the unreviewability of habeas decisions and the narrow scope of habeas issues are long gone, and the wide-open allowance of successive petitions is gone with them. Denial of federal habeas relief is reviewable by appeal to the court of appeals, 28 U. S. C. § 2253, rehearing en banc in that court, Fed. Rule App. Proc. 35, and certiorari in this Court. See 28 U. S. C. § 1254. The scope of issues now includes almost all constitutional questions, the only exception being the Fourth Amendment exclusionary rule. See, *e.g.*, *Withrow* v. *Williams*, 507 U. S. 680 (1993) (declining to extend rule of *Stone* v. *Powell*, 428 U. S. 465 (1976) to *Miranda* claim). Constitutional claims, furthermore, have been vastly expanded beyond the basic requirements of fundamental fairness. See *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (Stevens, J., dissenting). In capital cases, enormous amounts of time and money go into litigating alleged noncompliance with a complex and constantly changing web of rules governing the discretionary sentencing decision, rules having nothing whatever to do with guilt or eligibility for the death sentence. There is no limit to the number of such challenges creative lawyers could bring if allowed to do so, and hence without a successive petition rule capital sentences could never be carried out.

From the early twentieth century through the Antiterrorism and Effective Death Penalty Act of 1996, the law of habeas

corpus evolved in the direction of greater finality, although not without " 'some backing and filling.' " Cf. *Teague* v. *Lane*, 489 U. S. 288, 308 (1989) (plurality opinion) (quoting *Fay* v. *Noia*, 372 U. S. 391, 411-412 (1963)). *Salinger* v. *Loisel*, 265 U. S. 224 (1924) was the first recognition of the rule in this Court. While rejecting the government's argument that a prior denial was res judicata, see *id.*, at 230, the Court held, "Among the matters which may be considered, and even given controlling weight, are . . . (b) a prior refusal to discharge on a like application." *Id.*, at 231. This was a very broad discretionary rule with no firm criteria for application. The Court indicated it would have affirmed if the District Court had denied relief on this basis, but it proceeded to the merits because the District Court had done so. *Id.*, at 232. Either resolution was proper.

When Congress enacted a new judiciary code, it included § 2244 on finality of determination. The original section was the same as the present subdivision (a), except that it applied to both state and federal prisoners. See 28 U. S. C. § 2244 (1964 ed.). In keeping with *Salinger*, the rule was discretionary. See S. Rep. No. 1559, 80th Cong., 2d Sess., 9 (1948). At the same time this bill was moving through Congress, this Court decided *Price* v. *Johnston*, 334 U. S. 266 (1948). *Price* limited *Salinger* to the situation "when a later *habeas corpus* application raising the same issues is considered." *Id.*, at 289. That is, *Price* distinguished the "successive" application in the narrow sense from the "abuse of the writ" defense.

Sanders v. *United States*, 373 U. S. 1 (1963) was the final chapter of "a trilogy of 'guideline' decisions" on habeas corpus. *Id.*, at 23 (Harlan, J., dissenting). "The over-all effect of this trilogy . . . [was] to relegate to a back seat . . . the principle that there must be some end to litigation." *Ibid.* *Sanders* sharply limited the *Salinger* rule regarding successive applications.

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior

application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." *Id.*, at 15 (footnote omitted).

In Sanders' case, his prior application had been denied for stating "only bald legal conclusions with no supporting factual allegations." *Id.*, at 19. Denial of the petition based on this defect in pleading without giving the petitioner an opportunity to amend was not considered a disposition on the merits. *Ibid.*

Congress soon acted to reduce successive petitions. The problem was not the number of cases in which relief was being granted but rather the burdens of the litigation. See H. R. Rep. No. 1892, 89th Cong., 2d Sess., 5 (1966); S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966). In addition, Congress found "disconcerting . . . the delays in executing State court sentences in capital cases as a result of habeas corpus applications seeking review of State court action . . . ." H. R. Rep. No. 1892, *supra*, at 5. Various proposals were considered to deal with this problem. See *id.*, at 5-6. One that survived in the final bill was "to add to section 2244 . . . provisions for a qualified application of res judicata." *Id.*, at 8. Subdivision (b) was added to provide that "after an evidentiary hearing on the merits of a factual issue, or after a hearing on the merits of an issue of law . . . a subsequent application . . . need not be entertained" unless based on a new ground which was not deliberately withheld or otherwise abusive.

Despite the clear intent of Congress to change the law in the direction of greater finality, see S. Rep. No. 1797, *supra*, at 2, it was another 20 years before this Court reexamined *Sanders*. Unfortunately, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) has no majority on the successive petition question. The plurality opinion reviews the history of the 1966 amendment. *Id.*, at 448-452. It then weighs the prisoner's interest in the "fundamental justice of his incarceration" versus the state's interest in finality. *Id.*, at 452-453. The plurality adopted Judge Friendly's "colorable claim of innocence" requirement for successive

petitions. *Id.*, at 454. "A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." *Id.*, at 444, n. 6. Five years later, *McCleskey* v. *Zant* reexamined the abuse-of-the-writ aspect of *Sanders* and adopted the cause-and-prejudice test for second petitions with claims omitted from the first. See 499 U. S., at 490.

In 1996, Congress decided that *Kuhlmann* and *McCleskey* had not gone far enough in restricting repeated rounds of habeas litigation. Just as in 1966, the concern was not with excessive grants of relief, but rather with the burden and especially the delay from the multiple rounds of litigation. In one notorious case, the *McCleskey* rule had not been clear enough to prevent the issuance of a stay of execution to entertain a *fifth* federal challenge to a death sentence on an obviously defaulted claim. See *Gomez* v. *United States Dist. Court for the Northern Dist. of Cal.* (*Harris*), 503 U. S. 653, 653-654 (1992) (*per curiam*). Senator Hatch cited the *Andrews* case, which took 18 years and 30 appeals. See 141 Cong. Rec. 15,062, col. 2 (1995). That case took almost three years on the second round of federal habeas. See *Andrews* v. *Deland*, 943 F. 2d 1162, 1168 (CA10 1991) (petition filed July 19, 1989), cert. denied, 502 U. S. 1110 (1992), rehearing denied, 503 U. S. 967 (March 30, 1992). This was in a case involving "no question of Andrews' participation in the crimes," 943 F. 2d, at 1186, an almost unbelievably horrific case of sadistic torture and multiple murder. See *State* v. *Pierre*, 572 P. 2d 1338, 1343-1344 (Utah 1977).

To preclude more than one round of federal review in all but the rarest cases, Congress clamped down hard on "second or successive" habeas corpus applications in its revision of § 2244(b). See *Tyler* v. *Cain*, 533 U. S. 656, 661-662 (2001). Subdivision (1) forbids without exception claims "presented in a prior application," *i.e.*, what has traditionally been called a "successive" petition. Subdivision (2) applies to claims "not presented in a prior application," *i.e.*, the "abuse of the writ" scenario. Only two narrow exceptions are allowed: (1) retroactive new rules; and (2) newly discovered facts *and* actual

innocence. The references to the "merits" in former subdivision (b) are not present in the new subdivision.

Congress's intent to *preclude* the second round of litigation, not merely to enable the state to *prevail* in that round, is further implemented by the extraordinary procedural measures in subdivision (b)(3). Subdivision (b)(3)(A) requires leave of the court of appeals to even file the petition, and subdivision (b)(3)(B) requires that decision to be made by a three-judge panel. This is to preclude shopping for a single judge to authorize filing and grant a stay. Subdivision (b)(3)(D) requires a decision in 30 days, and (b)(3)(E) forbids rehearing or certiorari review of that decision. The clear purpose here is that, in nearly all cases, the attempt to begin a second or subsequent round of federal review will be over in 30 days. In most capital cases, the state should be able to set an execution date the month following final disposition of the first federal habeas petition.

The intent of Congress would be subverted if the limits on successive habeas petitions could be circumvented merely by invoking a different procedural device. Twice this Court has rebuffed such attempts. In *Gomez*, the habeas petitioner withheld his challenge to the use of cyanide gas until the eve of execution and then filed the claim as a civil rights action under 42 U. S. C. § 1983. See 503 U. S., at 653. "This action is an obvious attempt to avoid the application of *McCleskey* v. *Zant*, 499 U. S. 467 (1991) to bar this successive claim for relief." *Ibid.* The Court held that Harris had made no showing of cause, *ibid.*, impliedly holding that the *McCleskey* standard applied.

Calderon v. *Thompson*, 523 U. S. 538 (1998) is similar. "Thompson filed a motion with the Court of Appeals to recall its mandate denying habeas relief." *Id.*, at 546. He also filed a Rule 60(b) motion in the District Court. See *id.*, at 547. An en banc panel of the Court of Appeals recalled the mandate. It "asserted it did not recall the mandate on the basis of Thompson's later motion for recall, but did so *sua sponte* on the basis

of the claims and evidence presented in Thompson's first federal habeas petition." *Id.*, at 548.

Regarding recalls of habeas mandates in response to a petitioner's motion, the *Thompson* Court said,

> "In a § 2254 case, a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application for purposes of § 2244(b). Otherwise, petitioners could evade the bar against relitigation of claims presented in a prior application, § 2244(b)(1), or the bar against litigation of claims not presented in a prior application, § 2244(b)(2). *If the court grants such a motion, its action is subject to AEDPA* irrespective of whether the motion is based on old claims (in which case § 2244(b)(1) would apply) or new ones (in which case § 2244(b)(2) would apply)." *Id.*, at 553 (emphasis added).

This statement is *dictum*, since the Court went on to hold that the *sua sponte* recall on the original petition was not subject to § 2244(b). See *id.*, at 554. Even so, it is an important statement of principle, and one on which the Court appeared to be unanimous. See *id.*, at 569, n. 1 (Souter, J., dissenting).

Gomez and *Thompson* are applications of the more general principle that when Congress has provided a specific procedure for the resolution of particular controversies and placed limitations on it, those limitations cannot be evaded simply by choosing a different and more general procedure. Even though a challenge to the fact or duration of custody by state officers may fall within the broad language of the civil rights remedy statute, 42 U. S. C. § 1983, it cannot be used in lieu of habeas for such a challenge. See *Spencer* v. *Kemna*, 523 U. S. 1, 20 (1998) (Souter, J., concurring). Despite the broad wording of the All Writs Act, it cannot be used when another "statute specifically addresses the particular issue at hand . . . ." *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U. S. 34, 43 (1985).

The successive petition rule is a "modified res judicata rule," well within the power of Congress to enact. See *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996). Courts can weigh the competing interests of habeas petitioners and the state in the absence of a statute or in construing a vague statute, as this Court did in *Sanders*, *Kuhlmann*, and *McCleskey*, see *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996), but the balance struck judicially is always subject to legislative revision. Congress has deliberately moved the mark, and the wisdom of its choice is not for courts to decide. See *id.*, at 328. Neither is the statute a mere inconvenience to be evaded.

Congress meant to give habeas petitioners one round of federal review, *i.e.*, decision by the district court, appeal to the court of appeals, and certiorari to this Court. The end of that first round was meant to be the end in all but the rarest cases, with a highly expedited process for determining whether a case was one of the rare ones. A holding that Rule 60(b) is generally available would destroy this system. Even if nearly all Rule 60(b) motions are denied, unless they are subject to the requirements of § 2244(b) the litigation of them will become the second round of review that Congress meant to prevent.

II. The successive petition rule applies to this case.

Petitioner Abdur'Rahman filed his motion under Rule 60(b) to relitigate an issue already decided against him in a final judgment of the District Court.[4] This is generally the kind of relitigation the successive petition rule, now codified and strengthened in 28 U. S. C. § 2244(b)(1), was intended to

4. More precisely, the District Court's decision was "final" in the sense that term is used in 28 U. S. C. §§ 1291 and 2253(a) and Civil Rule 60(b), as opposed to the sense of completion of all proceedings on appeal. The case was final in the District Court because the District Court had entered its judgment disposing of the case, rather than an interlocutory order.

prevent. This case presents two variations on the standard theme that require discussion. The motion was filed before the mandate issued, and the District Court's ruling was based on procedural default.

A. The Appellate Mandate.

Petitioner notes that at the time he filed his Rule 60(b) motion the Court of Appeals had not issued its mandate, although it had decided the case and this Court had denied certiorari. See Brief for Petitioner 6-7. However, exhaustion of all appellate review has never been a defining characteristic of a successive petition. For example, in the notorious *Harris* case, Harris filed his second petition while the appeal from denial of the first was pending in the Court of Appeals. See *Harris* v. *Pulley*, 885 F. 2d 1354, 1358 (CA9 1989). Habeas Rule 9(b), governing "second or successive petition[s]," still applied. See *id.*, at 1369-1371, 1380 (applying rule, although finding it did not bar the claims).

If a second petition filed while the first is on appeal was understood to be a "second or successive petition" under Rule 9(b) before AEDPA, a similar petition must certainly be understood to fall within the meaning of the identical language under Congress's toughened standard. At the very least, "second or successive petition" should be understood to include any petition filed after the District Court renders its "final order," within the meaning of 28 U. S. C. § 2253(a), and which seeks to litigate an issue which was or could have been included in the previous petition.[5]

5. The questions of when an amendment to the first petition while it is still pending in the District Court may be subject to limitation under 28 U. S. C. § 2244(b)(2) or (d) should be considered in a case which actually presents those questions.

B. Successive Petitions and Defaulted Claims.

Petitioner argues that the successive petition rule does not apply, because it is limited to cases where the first petition was decided on the "merits," while his nondisclosure claim was "presented but unadjudicated in the original application." Brief for Petitioner 31.

This Court has on occasion referred to a successive petition as one which "raises grounds identical to those raised and rejected on the merits on a prior petition." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 444, n. 6 (1986) (plurality opinion). It does not follow, however, that this shorthand description refers to "the merits" in the narrow sense that petitioner uses the term. In its narrowest sense, the "merits" of a habeas case refers to the petitioner's underlying claim, without regard to procedural default, exhaustion, retroactivity, statute of limitations, or any other requirement. In a broader sense, though, the "merits" of a § 2254 case can be decided on any ground which resolves the only question that statute authorizes a federal court to answer—whether the petitioner is entitled to the relief he seeks. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 958-960 (1998). For example, if the habeas court decides that the rule the petitioner seeks would not apply retroactively to his case even if decided in his favor, the court must deny relief on that basis without reaching the underlying question. See *Caspari* v. *Bohlen*, 510 U. S. 383, 389-390 (1994). Similarly, under AEDPA, if a habeas court decides that the petitioner is in custody pursuant to the judgment of a state court which recognized the correct rule of law and reasonably applied it to the facts of the case, it must deny relief. See 28 U. S. C. § 2254(d)(1). This is a final decision that the petitioner is not entitled to relief, and it is a decision on the "merits" of the petition in the pertinent sense.

Slack v. *McDaniel*, 529 U. S. 473 (2000) and *Stewart* v. *Martinez-Villareal*, 523 U. S. 637 (1998) are consistent with this view of the merits. In both of those cases, the decision on the first petition was that the federal court could not grant relief

on the claim *yet*. In procedural default cases, the decision is that the federal court cannot grant relief on the claim *at all*. Petitioner claims the distinction between the two "lacks substance." Brief for Petitioner 33. On the contrary, the difference goes to the heart of the rationale of both decisions.

Slack addressed a petition dismissed as unexhausted. The dismissal rule is premised on the understanding "that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U. S., at 486. There is no such premise for defaulted claims. A defaulted claim is defaulted precisely because the state remedy is no longer available, see *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 855 (1999) (Stevens, J., dissenting), and no "return" to federal court is in the cards.

Martinez-Villareal is similar. Dismissal of a claim as premature, like dismissal for nonexhaustion, means the federal court cannot reach the underlying claim at that time. See 523 U. S., at 644-645 (comparing exhaustion). The distinction here is analogous to the distinction in res judicata cases, because the successive petition rule is " 'a modified res judicata rule.' " *Id.*, at 645 (quoting *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996)).

Even in civil litigation, this issue does not arise often, but it was discussed and decided in *Angel* v. *Bullington*, 330 U. S. 183 (1947). In that case, a decision of the North Carolina Supreme Court that the claim was barred was held to be res judicata in a subsequent suit in federal court.

> "It is suggested that the North Carolina Supreme Court did not adjudicate the 'merits' of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State.

* * *

> "The 'merits' of a claim are disposed of when it is refused enforcement. . . . [T]he 'merits' of that claim were adjudicated in the only sense that adjudication of the 'merits' is relevant to the principles of *res judicata*." *Id.*, at 190.

When a court has decided, in the second round of litigation, that a prior judgment is or is not res judicata, that decision may itself be res judicata and preclude reopening the preclusion question in a third round. See *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U. S. 518, 525 (1986). Similarly, under the successive petition rule, a prior decision that a claim is procedurally defaulted generally precludes reopening the default question.

In the present case, the District Court decided the default question in accordance with the precedent in effect at the time of the decision and at the time of the default. See J. A. 53 (citing *Silverburg* v. *Evitts*, 993 F. 2d 124, 126 (CA6 1993)). If petitioner believed that decision was erroneous or wished to argue for a change in the law, that path was open via appeal. See *Angel*, 330 U. S., at 189. Since Congress has provided appellate review, successive petitions can no longer be used as a substitute. Cf. *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). The successive petition rule applies to this case and forbids reopening the issue in the District Court. Rule 60(b) cannot be used to evade the finality that Congress chose to impose.

III. Even in regular civil cases, Rule 60(b) is not available to revive issues omitted from the appeal.

The present case "is not an ordinary case . . . , because [petitioner] seeks relief from a criminal judgment entered in state court." *Calderon* v. *Thompson*, 523 U. S. 538, 553 (1998). Such a case involves "more than ordinary concerns of finality . . . ." *Ibid.* Even in an ordinary civil case, however, Civil Rule 60(b) is not available to revive an issue omitted from the appeal.

Civil litigants occasionally try to use Rule 60(b) to ask the district court to correct allegedly erroneous rulings of law. See 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2858, p. 293 (2d ed. 1995). When the motion is made after the time to appeal has run, relief is almost invariably denied. See *id.*, at 296-298.

Ackermann v. *United States*, 340 U. S. 193 (1950) addressed this issue not long after the adoption of the Civil Rules. Ackermann decided not to appeal a judgment canceling his naturalization, due to the cost. See *id.*, at 195-196. A codefendant did appeal and obtained a reversal and dismissal. *Id.*, at 195. Even though the outcome in Ackermann's case was "probably wrong," *id.*, at 198, he was not entitled to relief under Rule 60(b). "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ibid.* For procedural default purposes, there is no distinction between omission of a particular issue and failure to appeal at all. See *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991).

Ackermann is on point. Petitioner cross-appealed from the District Court's decision, but not on the ground now asserted. This was a deliberate choice. Petitioner wished to reserve his limited appellate brief pages for the claims he apparently thought were better. See Brief for Petitioner 4; Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings, J. A. 155. There is nothing wrong with that choice. "This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail . . . is the hallmark of effective appellate advocacy." *Smith* v. *Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones* v. *Barnes*, 463 U. S. 745 (1983)). Counsel need not and should not "raise[ ] every colorable issue." *Jones*, 463 U. S., at 753. The consequence of the choice is that the arguments left on the cutting room floor are abandoned and cannot be raised later, except in unusual circumstances. See *Smith*, 477 U. S., at 534; cf. *id.*, at 537-538 (exception for fundamental miscarriage of justice).

Petitioner's contention that he did everything required at every stage of the proceedings to preserve his misconduct claim, see Brief for Petitioner 27, is not correct. He omitted the claim twice, on application for leave to appeal to the Tennessee Supreme Court and again on appeal to the Sixth Circuit. See Brief for Petitioner 3-4. At both of these times, the law gave him clear notice that the omission constituted abandonment of the claim.

The Sixth Circuit's original decision on appeal does not address the claims at issue here because they were not briefed. The first mention of those claims in the Sixth Circuit was in a motion filed after this Court denied certiorari. See Brief for Petitioner 6; J. A. 152, 155. That court stated in its order denying leave to file a second habeas petition, ". . . the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default." J. A. 37. The Court of Appeals reiterated that statement in conjunction with its denial of rehearing. J. A. 39.

Although the Court of Appeals could have been more explicit, this statement indicates that the change in Tennessee rules argued by petitioner could not revive his claim abandoned on the federal appeal, even if it really did reach back to revive claims previously defaulted in state court. Regardless of whether the District Court's ruling on procedural default was correct, the Court of Appeals' decision rests on the alternate, independent ground that petitioner did not appeal the default ruling.

As this Court has noted a number of times, procedural rules and finality sometimes " 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray* v. *Carrier*, 477 U. S. 478, 495 (1986) (quoting *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982)). If this were a case of injustice, the Sixth Circuit might well have bent the rules and reinstated petitioner's belated claim. But this is not such a case. The District Court thoroughly reviewed and rejected petitioner's "actual innocence" claim. See J. A. 63-68. The District Court

noted in particular that "Petitioner conveniently overlook[s] the fact that [he] admitted that he was guilty at the sentencing phase of the trial." J. A. 65. Not only is he clearly guilty of murder in the present case, but he has murdered before. See *State* v. *Jones*, 789 S. W. 2d 545, 552 (Tenn. 1990).

Under these circumstances, the Court of Appeals was well within its discretion to refuse to consider a claim omitted from the original appeal. Rule 60(b) cannot be used to evade this rule, just as it cannot be used to evade the habeas successive petition rule.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be affirmed.

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Respectfully submitted,

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